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CASE NBR: [09105503] CSY STATUS: []
SHORT TITLE: [Lynn, Frederick]
VERSUS [Alabama] DATE DOCKETED: [090289]
PAGE: [01]

~~~~~DATE~~~NOTE~~~~~PROCEEDINGS & ORDERS~~~~~  
Sep 2 1989 Petition for writ of certiorari and motion for leave to  
proceed in forma pauperis filed.  
Oct 2 1989 Brief of respondent Alabama in opposition filed.  
Oct 12 1989 DISTRIBUTED. October 27, 1989  
Oct 30 1989 The petition for a writ of certiorari is denied.  
Dissenting opinion by Justice Marshall with whom Justice  
Brennan joins. (Detached opinion.)  
\*\*\*\*\*

Command:[ ]

EDITOR'S NOTE

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**ORIGINAL**

89-5503  
②

NO.

IN THE SUPREME COURT OF THE UNITED STATES  
August Term, 1989

FREDERICK LYNN,  
Petitioner,

v.

STATE OF ALABAMA,  
Respondent.

Supreme Court, U.S.  
FILED  
SEP 02 1989  
JOSEPH F. SPANOL, JR.  
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PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA SUPREME COURT

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August 31, 1989

13 pp

QUESTIONS PRESENTED

Whether the prosecutor's use of his peremptory challenges to remove all eleven black persons from the petit jury with no adequate race-neutral explanation deprived the Petitioner of his Sixth Amendment United States Constitutional right to trial by an impartial jury representative of a fair cross-section of the community and his Fourteenth Amendment United States Constitutional right to equal protection of the laws.

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I. This Honorable Court Should Grant Certiorari to Consider the Constitutional Deprivation Incident to a Prosecutor's Use of His Peremptory Challenges to Remove All Eleven Black Persons from the Petit Jury With No Adequate Race-Neutral Explanation, Thereby Depriving the Petitioner of His Sixth Amendment United States Constitutional Right to a Trial by an Impartial Jury Representative of a Fair Cross-Section of the Community and His Fourteenth Amendment United States Constitutional Right to Equal Protection of the Laws.

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TABLE OF AUTHORITIESCASES

Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

NO.

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Ex parte Preston Branch, 526 So.2d 609 (Ala. 1987).

IN THE SUPREME COURT OF THE UNITED STATES  
August Term, 1989

Ex parte Carnel Jackson, 516 So.2d 768 (Ala. 1986).

FREDERICK LYNN,  
Petitioner,

Ex parte Frederick Lynn, 543 So.2d 709 (Ala. 1988).

v.

Alonzo Houston v. Alabama, Ala. S.Ct. No. 86-616 (1987), cert. granted, United States S.Ct. No. 86-7126 (May 1988).

STATE OF ALABAMA,  
Respondent.

Lynn v. State, 543 So.2d 704 (Ala. Cr. App. 1987)

People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983).

People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 220 Cal. Rptr. 656 (1986).

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TO THE ALABAMA SUPREME COURT

Slappy v. State of Florida, 503 So.2d 350 (Fla. 1987), rehearing denied March 20, 1987.

OPINIONS BELOW

State v. Neil, 457 So.2d 481 (Fla. 1984).

The Court of Criminal Appeals of Alabama affirmed the Petitioner's conviction, on return to remand, on June 9, 1987, and is reproduced at App. 1 (pages of the Appendix to this Petition). A Petition for Rehearing was denied by the Court of Criminal Appeals of Alabama on July 29, 1987, and is reproduced at App. 2. A Petition for a Writ of Certiorari was denied by the Alabama Supreme Court on December 30, 1988, and is reproduced at App. 3. An Application for Rehearing was overruled, without opinion, on July 14, 1989, and is reproduced at App. 4.

Strauder v. West Virginia, 100 U.S. 303 (1880).

Swain v. Alabama, 380 U.S. 202 (1965).

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI.

U.S. Const. amend. XIV, §1.

Ala.Code §13A-5-31(a)(4) (1975).

Ala.Code §12-6-55.

Ala.Code §12-6-56.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on December 30, 1988. The Petitioner's Application for Rehearing was overruled by the Alabama Supreme Court on July 14, 1989. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

## 1. United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. United States Constitution, Amendment XIV,  
Section 1

"No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The statute under which the Petitioner was convicted  
by a jury, Ala.Code §13A-5-31(a)(4) (1975), provides:

Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant.

4. Ala.Code §12-16-55 (1975), provides:

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the Court, and that all qualified citizens have the opportunity, in accordance with this article, to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. (Acts 1978, No. 594, p. 712 \$1).

5. Ala.Code §12-16-56 (1975), provides:

A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status. (Acts 1978, No. 594, p. 712, §2).

STATEMENT OF THE CASE

On April 25, 1983, the Barbour County, Alabama, Grand Jury returned the following capital indictment charging the Petitioner with violating §13A-5-31(a)(4) (murder during a burglary), Ala.Code, 1975.

The Grand Jury of said County charged that:

... Frederick Lynn, whose name is to the Grand Jury otherwise unknown, did, in the nighttime, with intent to commit a felony, to-wit: Burglary, First Degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: That certain house located at 593 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31(a)(4) of the 1975 Code of Alabama, as amended.

On May 2, 1983, the Petitioner, Frederick Lynn, was arraigned. At arraignment, the Petitioner, who was sixteen years of age at the time of the occurrence of the murder, filed an application to be tried as a youthful offender. (7C-8C in record in 4 Div. 183). The application was denied. (8C in record in 4 Div. 183). At arraignment, Frederick Lynn pled "not guilty". On May 26, 1983, the Defendant was found guilty of the capital offense. (R. 369). After further proceedings, the jury recommended a death sentence. (R. 404). On May 31, 1983, the Judge fixed the Petitioner's punishment as death by electrocution. (R. 423). On October 23, 1984, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction; however, the Alabama Supreme Court granted certiorari and on July 3, 1985, the Alabama Supreme Court reversed the conviction and remanded the case for a new trial. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985).

The Petitioner was retried on March 31 through April 4, 1986. On April 4, 1986, the jury returned a verdict of "guilty". (R. 388). After further proceedings, the jury recommended a sentence of death by electrocution in the electric chair. (R. 432). On April 9, 1986, the trial Judge held a sentencing hearing at

REASONS FOR GRANTING THE WRIT

which time he fixed the sentence as death by electrocution. (R. 443).

On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County for that Court to make a determination as to whether the prosecutor's striking of all eleven blacks from the jury venire was racially motivated. On May 13, 1987, the Circuit Court held a hearing to determine whether the prosecution's strikes were racially motivated and ruled that, although a prima facie case of purposeful discrimination existed, the prosecution had rebutted the presumption of purposeful discrimination through adequate race-neutral explanation of its peremptory challenges. On June 9, 1987, on return to remand, the Court of Criminal Appeals affirmed Lynn's conviction. On July 28, 1987, Lynn's Application for Rehearing was overruled by the Alabama Court of Criminal Appeals. Pursuant to the Code of Alabama §13A-5-55, the Alabama Supreme Court granted certiorari on November 25, 1987. The Alabama Supreme Court affirmed the judgment of the Court of Criminal Appeals on December 30, 1988. [Ex parte Lynn, 543 So.2d 709 (Ala. 1988)]. A Motion for Reconsideration was denied on July 14, 1989.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL DEPRIVATION INCIDENT TO A PROSECUTOR'S USE OF HIS PEREMPTORY CHALLENGES TO REMOVE ALL ELEVEN BLACK PERSONS FROM THE PETIT JURY WITH NO ADEQUATE RACE-NEUTRAL EXPLANATION, THEREBY DEPRIVING THE PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY AN IMPARTIAL JURY REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY AND HIS FOURTEENTH AMENDMENT UNITED STATES CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

A review on Writ of Certiorari is a matter of judicial discretion, and will be granted only for special and important reasons. The Alabama Supreme Court has decided an important question of federal constitutional law in a manner which conflicts with applicable decisions of this Honorable Court. This is a capital murder case for which the Petitioner was sentenced to death by electrocution, in which the Alabama Supreme Court denied the Petitioner's Writ of Certiorari in the face of evidence which clearly indicated that the government prosecutor was racially biased in his striking of all eleven black persons from the petit jury for which there was no adequate race-neutral explanation given.

The Petitioner, Frederick Lynn, asserts that the government prosecutor purposely excluded all blacks from his jury solely on the basis of race, in direct contravention of this Honorable Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and violated the guidelines for the determination of whether the prosecutor provided adequate race-neutral explanations for the striking of blacks from the jury venire as provided by the Alabama Supreme Court in Ex parte Jackson, 516 So.2d 768 (Ala. 1986) and Ex parte Branch, 526 So.2d 609 (Ala. 1987). In the instant case, during the voir dire proceedings, the government prosecutor exercised eleven of his fourteen peremptory strikes to remove all eleven blacks from the Petitioner's jury. It should also be noted that the Petitioner is a black male and the victim was a white female.

This Honorable Court in Batson v. Kentucky, supra, addressed an equal protection challenge to the prosecutor's exclusion of blacks from the petit jury through the use of his

peremptory challenges. This Court acknowledged the State's privilege to strike individual jurors through peremptory challenges. However, this Court noted that these peremptory challenges are subject to the equal protection clause, stating that:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group, will be unable impartially to consider the state's case against a black defendant. (Emphasis added). Batson, 106 S.Ct. at 1719.

This Court reiterated that purposeful racial discrimination in selection of the venire violates a Defendant's rights to equal protection because it denies him the protection that a trial jury is intended to secure.

The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds . . . Those on the venire must be "indifferently chosen" to secure the Defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Batson, 106 S.Ct. at 1717, quoting Strauder v. West Virginia, 100 U.S. 303 (1880).

A systematic plan for purposely excluding all or most black veniremen from the petit jury is not a prerequisite for a constitutional violation under the Batson decision. The prosecutor's challenge of a single black on racial grounds will deprive the Defendant of his rights under both the Sixth and Fourteenth Amendments since "a State's purposeful or deliberate denial of Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Ex Parte Jackson, S.Ct., Alabama No. 84-1112 (December 1986), citing Swain v. Alabama, 380 U.S. 202, 203-04 (1965). This Court reasoned that:

. . . "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause." A single invidiously discriminatory governmental act" is not immunized by the absence of

such discrimination in the making of other comparable decisions." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). (Emphasis added).

This Honorable Court appeared to affirm this fact in the case of Alonzo Houston v. Alabama, Ala. S.Ct. No. 86-616 (1987), cert. granted, United States S.Ct. No. 86-7126 (May 1988), in which this Court granted the Petitioner's petition for writ of certiorari and remanded the judgment on the grounds that the removal of a single black from the petit jury by the government prosecutor without adequate race-neutral explanation denies the criminal defendant his Sixth Amendment United States Constitutional right to a trial by an impartial jury representative of a fair cross-section of the community and his Fourteenth Amendment United States Constitutional right to equal protection of the laws.

This Court in Batson, supra, articulated the following three-prong test that the Defendant must meet to establish a prima facie case of purposeful racial discrimination based upon the prosecutor's exercise of his peremptory challenges during the voir dire proceedings: Batson, 106 S.Ct. at 1723. (1) The Defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the Defendant's race, (2) The Defendant is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitute a jury selection practice "those to discriminate who are of a mind to discriminate", (3) The Defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. The Petitioner, a black man, is a member of an identifiable racial group. Furthermore, since the government struck all black jurors from the petit jury with the use of its peremptory challenges, a prima facie case under Batson, supra, has been established, with a presumption that the peremptory challenges were used to discriminate against

black jurors. Lynn v. State, 543 So.2d 704, 708 (Ala. Cr. App. 1987).

After a prima facie case of discrimination has been established by the Defendant, the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. Jackson, *supra*; People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal. Rptr. 890 (1978). In the case of Ex parte Branch, 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court has established certain guidelines whereby the Court may be guided in assessing the "neutrality" of the prosecution's use of his peremptory strikes. Ex parte Branch, at 623, provides:

In addition to a clear, specific and plausible nondiscriminatory explanation of a specific characteristic that affected the decision to challenge, the following are illustrative of the types of evidence that can be used to overcome the presumption of discrimination and show neutrality:

1. The state challenged non-black jurors with the same or similar characteristics as the black jurors who were struck.
2. There is no evidence of a pattern of strikes used to challenge black jurors; e.g., having a total of 6 peremptory challenges, the state used 2 to strike black jurors and 4 to strike white jurors, and there were blacks remaining on the venire.

[5] Batson makes it clear, however, that 'the State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' Batson, 476 U.S. at 94, 106 S.Ct. at 1721, citing Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. Finally, a prosecutor cannot overcome the presumption 'merely by denying any discriminatory motive or affirming his good faith in individual selections.' Batson, 476 U.S. at 98, 106 S.Ct. at 1723, citing Alexander, 405 U.S. at 632, 92 S.Ct. at 1226.

Once the prosecutor has articulated a non-discriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. Wheeler, 22 Cal.2d at 282, 583 P.2d at 763-64, 148 Cal. Rptr. at 906. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:

1. The reasons given are not related to the facts of the case.
  2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
  3. Disparate treatment - persons with the same or similar characteristics as the challenged juror were not struck. Slappy, 503 So.2d at 354; Wheeler, 22 Cal.3d at 282, 583 P.2d at 760, 148 Cal. Rptr. at 906.
  4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.
  5. The prosecutor, having 6 peremptory challenged, used 2 to remove the only 2 blacks remaining on the venire. Slappy, 503 So.2d at 354; People v. Turner, 42 Cal.3d 711, 715, 726 P.2d 102, 103, 230 Cal. Rptr. 656, 657 (1986).
  6. 'An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.' Slappy, 503 So.2d at 355. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror.
- [6, 7]. The trial court, in exercising the duties imposed upon it, must give effect to the state policy expressed in Sections 1, 6, and 22 of the Alabama Constitution and Code 1975, §12-16-55 and §12-16-56. Furthermore, the trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the prosecutor examined the venire and the challenged jurors. People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 858, 197 Cal. Rptr. 71 (1983); see also Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.
- In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge:

'The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as a bias relating to the particular case on trial or the parties or witnesses thereto. Wheeler, 22 Cal.2d at 276, 148 Cal. Rptr. at 903, 583 P.2d at 760.' Slappy, 503 So.2d at 354.

The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, see Hall, 35 Cal.3d at 168, 672 P.2d at 858-59, 197 Cal. Rptr. at 75; Slappy, 503 So.2d at 356; the judge must consider whether the racially neutral explanations are contrived to avoid admitting acts of group discrimination. See Slappy, supra. This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror. Finally, if the trial judge determines that there was discriminatory use of peremptory challenges, an appropriate remedy may be to dismiss that jury pool and start over with a new pool. Jackson, supra, citing State v. Neil, 457 So.2d 481, 487, (Fla. 1984). This remedy is not exclusive, however.

Ex parte Branch, 526 So.2d 609.

The Petitioner asserts that the instant case violates the mandates against purposeful racial discrimination in the striking of black veniremen that this Honorable Court set forth in Batson, supra, as well as the guidelines articulated by the Alabama Supreme Court in Branch, supra. In Lynn, there was virtually no questioning of black venire persons, or at best, only desultory voir dire directed towards blacks by the government prosecutor. On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County to make a determination as to whether the prosecutor's striking of all blacks from the jury venire was racially motivated. On May 13, 1987, the Circuit Court held a Batson hearing in order to make this determination. (R. 3). The Circuit Court specifically found that a prima facie case of purposeful discrimination existed in the Lynn case. (R. 4). However, the Circuit Court failed to find that the government prosecutor's strikes were racially motivated, and refused to grant the Petitioner's motion for a new trial. (R. 33). The Petitioner now asserts that the trial judge's ruling was clearly erroneous in that the prosecutor's explanations were not adequate race-neutral explanations as

mandated by Batson, supra, and Branch, supra. While the Petitioner again reiterates the fact that a prima facie case of purposeful racial discrimination was established under Batson, supra, and Branch, supra, in that all eleven black veniremen were struck by the government prosecutor, the Petitioner specifically challenges the prosecutor's explanations for striking the following black veniremen from the petit jury:

(1) Government Strike #3, Juror #11 - Larry B. Farmer: A black male, twenty-five (25) years of age at the time of the trial. The government prosecutor gave as his reasons for striking this black man that Mr. Farmer was "reputed to be connected with drugs", that his father had a felony record and had been convicted of a drug-related offense, and that Mr. Farmer lived in the same area of the county as did the lead defense counsel, Mr. McKinnon, and that Mr. Farmer "might" know the counsel for the defense. Finally, the government prosecutor stated that he was young and felt that the juror would not be favorable to the death penalty. (R. 6; 7).

The Petitioner asserts that these reasons given by the government prosecutor are vague, superficial and fail to meet the test for race-neutral reasons to exercise a challenge. The record reflects that the prosecutor failed to engage the juror in even desultory voir dire. Furthermore, the prosecution failed to strike juror number two, a white male, who at the time of trial was only twenty-two (22) years of age, as well as juror number twenty-eight, a white male, who at the time of trial was only twenty-eight (28) years of age. These facts substantiate the Petitioner's assertions that the prosecutor's reason given concerning Mr. Farmer's age were not race-neutral, and evidences the disparate treatment of blacks rendered by the prosecutor in the jury selection.

In regard to the explanation given by the prosecutor that Mr. Farmer "might" know the lead defense attorney, if the prosecutor had been concerned about a possible relationship, he could have asked the juror about any friendship. However, again, the prosecutor

failed to engage the juror in even desultory voir dire, in direct contravention of Batson, *supra*, and the guidelines enunciated in Branch, *supra*.

(2) Government Strike #4, Juror #38 - Robert J. Thornton:

Mr. Thornton was a fifty-nine (59) year old black male at the time of trial. The government prosecutor stated that he struck Mr. Thornton from the jury venire because the juror lived in an area where the defendant was living at the time of the crime and where the defendant's grandmother and aunt resided. (R. 7). The prosecutor stated that ". . . he felt that friendship would possibly be there that would bias him, and for that reason we struck him." (Emphasis added) (R. 7).

The Petitioner avers that these reasons given by the government prosecutor for striking this black juror do not meet the stringent standards under Batson, *supra*, and Branch, *supra*. The record reflects that the prosecutor failed to direct even one question to Mr. Thornton concerning his "possible friendship" or relationship. If the government prosecutor had been concerned about a possible bias on the part of Mr. Thornton, he could have asked Mr. Thornton questions about his relationship with the Petitioner or his grandmother and aunt. This the prosecutor failed to do.

Furthermore, the Petitioner asserts that the explanation given by the prosecutor that Mr. Thornton lived in the same area of town as the Defendant and his grandmother and aunt is not a valid race-neutral reason, but is rather an impermissible group bias violating Branch, *supra*, at 624. This case was tried in Eufaula, Alabama. During the Batson hearing conducted on May 13, 1987, the government prosecutor stated that ". . . this is a very small community with a population of twenty-five thousand (25,000) people [county population] of which over twelve thousand five hundred (12,500) live in the Eufaula area and would have been potential jurors." (R. 8). It is a well-known fact that in small, rural areas of the South, blacks tend to live in the same

neighborhoods and they do so in Eufaula, Alabama. Therefore, following the rationale set forth by the government prosecutor, and upheld by the Alabama Courts, it would be virtually impossible for a black person in rural communities of the South to ever sit on a jury where the criminal defendant was black. In effect, blacks in Eufaula, Alabama, were rendered ineligible for jury duty in the Petitioner's case or any other similar situation because of a group bias having no relationship whatsoever with the facts of the case, in direct contravention of Batson, *supra*, and Branch, *supra*.

(3) Government Strike #5, Juror #19 - Jim H. Jackson:

Mr. Jackson was a black male, age thirty-five (35) at the time of the trial. The government prosecutor gave as his explanation for striking Mr. Jackson that he was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a government witness against the Defendant. Mr. Strong, the accomplice, had a "bad reputation" in the community and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. The prosecutor felt that "if" the juror knew Mr. Strong he "might" not believe his testimony. (R. 8). Additionally, a small community was involved and the juror's name was Jackson. The prosecutor had prosecuted several black people named Jackson during the past eight years, and was concerned that the juror might be related to one of those persons. (R. 8).

The Petitioner asserts that these reasons given by the government prosecutor were not adequate race-neutral explanations. The prosecutor stated that Mr. Jackson "might" have known the accomplice, Gary Marcus Strong, and that he "might" have been related to some people that he had prosecuted named Jackson. However, significantly, the prosecutor acknowledged that the surname "Jackson" was a common name in the community. (R. 9). Furthermore, the record of voir dire proceedings once again reflects the fact that the prosecutor failed to engage the juror in even desultory voir dire - that there was, in fact, a total lack of questioning of Mr. Jackson on part of the prosecution.

If the prosecutor had been concerned about whether Mr. Jackson "might" have known the accomplice, or whether he "might" have been related to some people that he had convicted, he could have asked Mr. Jackson about these possible relationships.

Furthermore, since Gary Marcus Strong had already pleaded guilty to a lesser offense involving this crime, as part of a plea bargain agreement with the State of Alabama, white people in the community were just as aware of the bad reputation of Gary Marcus Strong as were the black people of the community. Therefore, the government prosecutor's argument must fail as being a mere sham reason violating the strict standards enunciated in Batson, supra, and Branch, supra.

(4) Government Strike #6, Juror #42 - Rose M. Wright:

At the time of trial, Ms. Wright, a black female, was twenty-eight (28) years of age. The government prosecutor stated as his reasons for striking Ms. Wright that she was young, unemployed, and lived close to a city magistrate who happened to be named Peggy Wright. (R. 10). The prosecutor stated that he was concerned about the fact that the lead defense counsel was also the City Clerk of the City of Eufaula, Alabama, where Ms. Peggy Wright was the City Magistrate and that "he did not know whether Rose M. Wright is related to Ms. Peggy Wright, the City Magistrate. (R. 10).

The Petitioner again asserts that these are vague, superficial explanations which do not meet the rigid requirements of "clear, specific and legitimate" reasons as mandated by this Honorable Court in Batson, supra. Once again, the government attempted to prove a race-neutral explanation by alleging a possibility of bias on the part of a juror who lived in the "same neighborhood" as someone who "might" have been connected with the Defendant. However, once again, the record reflects that the prosecutor failed to ask the juror any questions on voir dire, which is ". . . illustrative of the types of evidence that can be used to show sham or pretext". Branch, supra, at 624. Furthermore, the government prosecutor stated that Ms. Wright's age of twenty-eight (28), made her unattractive as a juror;

however, significantly, the prosecutor failed to strike juror #2, a white male, who at the time of trial was only twenty-two (22) years of age, and juror #28, another white male, who at the time of trial was only twenty-eight (28) years of age, the same age as Ms. Wright, whom the prosecution eliminated. The Alabama Supreme Court stated in Branch, supra, that "Disparate treatment - persons with the same or similar characteristics as the challenged jurors were not struck," is ". . . illustrative of the types of evidence that can be used to show sham or pretext." Branch, supra, at 624. The Petitioner asserts that this fact is further evidence of disparate treatment with which the government prosecutor struck the veniremen from the jury, violating the guidelines for race-neutral explanations specifically articulated in Branch, supra, at 624, for determining the existence of purposeful racial discrimination under Batson, supra.

(5) Government Strike #7, Juror #36 - Rochella Streeter:

At the time of trial, Ms. Streeter, a black female, was thirty-three (33) years old. The government prosecutor stated that the reason he struck Ms. Streeter from the jury was that Ms. Streeter lived "approximately one block away" from the co-defendant, accomplice, Gary Marcus Strong, and that he "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." (R. 10). The prosecutor stated that another reason for striking Ms. Streeter was that she lived in "a very high crime district" and might "not be as shocked or opposed to crime because those things just happen in those neighborhoods more than others." (She lived in a predominantly black neighborhood). (R. 11). However, again, the government prosecutor failed to direct a single question to Ms. Streeter regarding any of these concerns. The Petitioner avers that Ms. Streeter could very well have had very strong feelings against criminal behavior for the very reason that she does come from an alleged "high crime district." The important fact here is that the government prosecutor failed to inquire about these alleged concerns during voir dire; in fact, the prosecutor failed to ask Ms. Streeter even a single question. The Petitioner asserts that

these are all reasons which do not meet the rigid standards of the specific, ascertainable race-neutral explanations required by Batson, supra, and that these sham reasons were contrived by the government prosecutor to disguise his true motive of purposeful racial discrimination against the black veniremen, thereby denying the Petitioner equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Batson, 106 S.Ct. at 1719.

(6) Government Strike #9, Juror #26 - Helen D. Morris:  
At the time of the Petitioner's trial, Ms. Morris, a black female, was fifty-two (52) years of age. The government prosecutor stated as his explanation for striking Ms. Morris that:

She also lives on Gammage Road and was a neighbor to Ms. Rency Lynn who is the Defendant's grandmother and also Alvester Lampley who is the Defendant's aunt, and also was living in close proximity to the Defendant who was living with his grandmother and aunt at the time of the crime. We felt [that] the possibility of knowing these people might affect her fairness, and for that reason we struck her. (Emphasis added). (R. 11).

The Petitioner avers that these aforementioned reasons given by the government prosecutor are not adequate race-neutral explanations. Again, the record reflects that the government prosecutor failed to engage Ms. Morris in even desultory voir dire, by failing to direct one single question to Ms. Morris during the voir dire proceedings.

The Petitioner asserts that the government prosecutor's explanation that Ms. Morris "might" be biased because of the "possibility" of knowing either the Defendant's grandmother or his aunt is unsubstantiated, but is rather an example of an impermissible group bias violating Branch, in that it is "[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically." Branch, supra, at 624, quoting Slappy, 503 So.2d at 355. As the prosecutor himself testified under oath, the community where the Petitioner was tried is a "very small community of a population

of twenty-five thousand people of which over twelve thousand five hundred live in the Eufaula area and would have been potential jurors." (R. 8). Therefore, because of the fact that in rural communities of the South, it is very common for blacks to live in the same neighborhoods, it would be virtually impossible for a black person residing in rural communities in the South to ever sit on a jury where the criminal defendant was black, if the rationale enunciated by the government prosecutor, and followed by the Alabama courts, were to be followed by this Honorable Court. The Petitioner asserts that the explanation articulated by the government prosecutor for striking Ms. Morris from the petit jury falls far short of "clear, specific, and legitimate" reasons required for adequate race-neutral explanation. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

It is apparent that the prosecutor's exercise of his peremptory challenges to rid the jury venire of all eleven blacks, and specifically those challenges concerning jurors 11, 38, 19, 42, 36, and 26, did not meet the strict criteria of "clear, specific and legitimate" reasons as mandated by this Honorable Court in Batson, supra, and also violates the guidelines for adequate race-neutral explanation as set forth by the Alabama Supreme Court in Branch, supra. Furthermore, this case is a proper one for this Honorable Court to grant certiorari and vacate the Petitioner's conviction because of the fact that purposeful discrimination against even one black venireman without adequate race-neutral explanation violates Batson. Alonzo Houston v. Alabama, Ala. S.Ct. 86-616 (1987), cert. granted, United States S.Ct. No. 86-7126 (May 1988). Consequently, the prosecution failed to meet its burden in rebutting the Petitioner's prima facie case of purposeful discrimination against the black jury veniremen. The jury selection process in Lynn deprived the Petitioner of his Sixth Amendment right to trial by a jury representative of a fair cross-section of the community and of his Fourteenth Amendment right to equal protection of the laws. As Justice Jones of the Alabama Supreme Court in his special concurrence so eloquently stated, "How long, oh,

how long will we persist in the hollow notion that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants?" Ex parte Lynn, 543 So.2d 709, 714 (Ala. 1988). As the answer to this question, and for all of the above reasons, the Petitioner, Frederick Lynn, respectfully urges this Honorable Court to order the Courts below to set aside his conviction and sentence as a matter of law.

#### CONCLUSION

For the prejudicial errors and denials of constitutional rights guaranteed by the Alabama and United States Constitution, the Petitioner respectfully urges this Honorable Court to grant the Writ of Certiorari, set aside his conviction, and grant such other relief as the Court may deem necessary and appropriate.

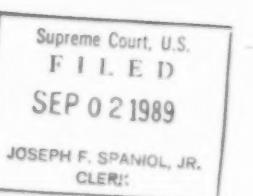
Respectfully submitted,  
TURBERVILLE & ANDREWS, P.C.

  
L. DAN TURBERVILLE  
Attorney for the Petitioner  
1117 22nd Street South  
Birmingham, AL 35205  
(205) 939-0000

89-5503

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Writ of Certiorari upon Honorable Don Siegelman, Attorney General for the State of Alabama, by placing a copy of same in the U.S. Mail, first class postage prepaid this the 31 day of August, 1989.



defendant had seven (7) prior felony convictions."

"The elements of an action against an attorney in his professional capacity for negligence are essentially no different from those of any other negligence suit. *Mallory v. Sullivan*, 387 So.2d 169 (Ala. 1980). To recover, the appellant must prove a duty, a breach of duty, that the breach was the proximate cause of the injury, and damages."

*Herston v. Whitesell*, 348 So.2d 1054 (Ala. 1977).

[1] In reviewing the only evidence presented, we cannot say the trial court committed error in finding against appellant on the negligent malpractice claim.

[2] We also observe that under the proof, appellant was awarded all damages under the contract count to which he would have been entitled under the negligent malpractice count. Neither theory would have supported damages for mental anguish.

"There can be no recovery for emotional distress, where [the legal malpractice] does not involve any affirmative wrongdoing but merely neglect of duty, and the client may not recover for mental anguish where the contract which was breached, was not predominantly personal in nature."

7A C.J.S. *Attorney and Client* § 273a (1987), p. 505.

Under the breach of contract count the court awarded appellant \$6,500 damages, being the total amount of the fee paid by appellant to appellee for representation in the criminal case which resulted in the conviction.

As to appellant's claim for damages for mental anguish under the contract count, the Supreme Court said in *B & M Homes, Inc. v. Hogan*, 376 So.2d 667 (Ala.1979):

"In Alabama the general rule is that mental anguish is not a recoverable element of damages arising from breach of contract. *Sanford v. Western Life Insurance Co.*, 368 So.2d 260 (Ala.1979); *Stead v. Blue Cross-Blue Shield of Alabama*, 346 So.2d 1140 (Ala.1977)."

Appellant has not shown that he comes within the narrow exceptions to this general rule. See, *F. Becker Asphaltum Roofing Co. v. Murphy*, 224 Ala. 655, 141 So. 630 (1932); *Birmingham Water Works Co. v. Ferguson*, 164 Ala. 494, 51 So. 150 (1909).

With respect to appellant's final contention that the trial court erred in not finding against the partners of appellee, suffice it to say that there was a total failure of proof on the question of partnership.

Based on the foregoing, the judgment of the trial court is due to be, and is, affirmed.

The foregoing opinion was prepared by Retired Circuit Judge J. ED TEASE while serving on active duty status as a judge of this court under the provisions of section 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.



Fredrick LYNN

v.

STATE.

4 Div. 698.

Court of Criminal Appeals of Alabama.

March 10, 1987.

On Return to Remand June 9, 1987.

Rehearing Denied July 28, 1987.

Defendant was convicted of capital murder by the Circuit Court, Barbour County, Jack W. Wallace, J., and defendant appealed. The Court of Criminal Appeals, 477 So.2d 1365, affirmed. On certiorari, the Supreme Court, 477 So.2d 1385, reversed and remanded, which was reversed and remanded by the Court of Criminal Appeals, 477 So.2d 1388. On remand, de-

fendant was again convicted by the Circuit Court, appealed from second conviction. The Court of Criminal Appeals, P.J., held that: (1) the prosecutor engaged in purposeful discrimination in his peremptory challenges; (2) defendant as mayor as juror was proper; (3) sentence of death was aggravating and mitigating factors. On return to remand, the Court of Appeals further held that the prosecutor did not engage in purposeful discrimination in his exercise of his peremptory challenges; though all black potential jurors were excluded from panel.

Affirmed.

And judgment affirmed  
2d 709.

1. **Criminal Law**  $\Leftrightarrow$  1181.50  
Issue of whether prosecutor's challenge of all black jurors by peremptory strikes required mandatory hearing for determination whether facts established purposeful discrimination. Prosecution could come for neutral explanations for its

2. **Jury**  $\Leftrightarrow$  83(3)

Defendant's challenge of prosecutor, who was mayor of town where crime was committed, was proper where there was no showing that he actually exercised his supervisory power over police officers during investigation that he participated in investigation.

3. **Jury**  $\Leftrightarrow$  79(3)

Defendant's motion in nolle prosequi for random reduction of jury panel would ensure that some black jurors were properly denied, as they were not entitled to petit jury composition or in part of persons of different races.

4. **Jury**  $\Leftrightarrow$  136(5)

Defendant's motion in nolle prosequi to be allowed two jury strikes was proper as State received was properly

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fendant was again convicted of capital murder by the Circuit Court, and defendant appealed from second conviction and sentence. The Court of Criminal Appeals, Bowen, P.J., held that: (1) issue of whether prosecutor engaged in purposeful discrimination in his peremptory jury strikes required remand; (2) defendant's challenge to mayor as juror was properly denied; and (3) sentence of death was proper given aggravating and mitigating circumstances. On return to remand, the Court of Criminal Appeals further held that prosecutor did not engage in purposeful discrimination in his exercise of his peremptory jury strikes, though all black potential jurors were excluded from panel.

Affirmed.

And judgment affirmed, Ala., 543 So.2d 709.

#### 1. Criminal Law $\Leftrightarrow$ 1181.5(3)

Issue of whether prosecutor intentionally excluded black jurors by his peremptory jury strikes required remand for evidentiary hearing for determination as to whether facts established prima facie case of purposeful discrimination and whether prosecution could come forward with race-neutral explanations for its strikes.

#### 2. Jury $\Leftrightarrow$ 83(3)

Defendant's challenge for cause of juror, who was mayor of town in which murder was committed, was properly denied, where there was no showing that mayor actually exercised his supervisory authority over police officers during investigation or that he participated in investigation.

#### On Return To Remand

#### 9. Jury $\Leftrightarrow$ 33(5.1), 121

Prima facie case of purposeful discrimination was established by fact that prosecutor struck all blacks from jury panel, but prosecutor explained reasons for striking all black persons from jury for race-neutral purposes and thus, prosecutor did not engage in purposeful racial discrimination.

Donald J. McKinney, Eufaula, for appellant.

Don Siegelman, Atty. Gen., and P. David Bjurberg and William D. Little, Asst. Atty. Gen., for appellee.

#### 5. Criminal Law $\Leftrightarrow$ 1168(2)

State investigator's description of rooms in murder victim's house as "ransacked," was merely summary of his other testimony and cumulative to other evidence of condition of rooms in victim's home, including photographs, and thus, did not require reversal.

#### 6. Witnesses $\Leftrightarrow$ 246(4)

Prosecutor was permitted to ask state witness whether he knew victim was killed on particular date, though such question was leading question, where date had been established by testimony of prior witnesses, date was not contested issue at trial, and witness testified that he was not familiar with date.

#### 7. Criminal Law $\Leftrightarrow$ 730(7)

Prosecutor's statement in closing argument that he believed accomplice's statements that defendant killed victim, if error due to injection of prosecutor's personal opinion and knowledge into case, was harmless when trial judge immediately instructed jury that they should disregard comments.

#### 8. Homicide $\Leftrightarrow$ 354

Sentence of defendant to death for burglary and murder was proper sentence and was neither excessive nor disproportionate to penalty imposed in similar cases, considering both aggravating and mitigating circumstances, crimes, and defendant.

#### BOWEN, Presiding Judge.

In 1983, sixteen-year-old Fredrick Lynn was convicted and sentenced to death for the capital offense involving burglary and the murder of Marie Driggers Smith. Alabama Code 1975, § 13A-5-31(a)(4). That conviction and sentence were reversed on appeal. *Lynn v. State*, 477 So.2d 1365 (Ala.Cr.App.1984), reversed, *Ex parte Lynn*, 477 So.2d 1385 (Ala.1985).

On remand, *Lynn v. State*, 477 So.2d 1388 (Ala.Cr.App.1985), Lynn was retried and again convicted and sentenced to death. This appeal is from that second conviction and sentence.

On the issue of the alleged use of racial discrimination by the prosecutor in his peremptory jury strikes, the parties agree that this case is controlled by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *Ex parte Jackson*, 516 So.2d 768 (Ala.1986).

[1] Our independent review of the record convinces us of the propriety of the Attorney General's recommendation that this cause be remanded for an evidentiary hearing on this issue. Therefore, it is the judgment of this Court that this cause be remanded to the Circuit Court of Barbour County with directions that an evidentiary hearing be conducted. The trial court should determine whether or not the facts establish a prima facie case of purposeful discrimination. If a prima facie case of purposeful discrimination is established and the prosecution does not come forward with race-neutral explanations for its strikes, then Lynn is entitled to a new trial. If the trial judge finds that there was no purposeful discrimination involved in the selection of the jury, he is directed to forward to this Court a transcript of the evidentiary hearing together with a report of his factual findings.

#### II

The defendant's challenge for cause of venireman Little was properly denied. Lit-

tle had been the mayor of Eufaula and in that capacity had exercised "supervisory authority" over Captain Ted Dotson and Lieutenant Earlie Dinkins of the Eufaula Police Department. Both officers participated in the investigation of the crime for which Lynn was convicted and both testified at his trial. Little indicated that having served in that supervisory capacity over the officers would not affect his ability to render a fair and just verdict.

[2] In the absence of any showing that Mayor Little actually exercised his "supervisory authority" over the officers at any time during the investigation or that he participated in the investigation, we find that the challenge for cause was properly denied. See *Lowe v. State*, 384 So.2d 264, 1171 (Ala.Cr.App.), cert. denied, *Ex parte Lowe*, 384 So.2d 1171 (Ala.1980) (The fact that the entire person was employed by the district attorney's office did not alone impute bias as a matter of law); *Nettles v. State*, 435 So.2d 146 (Ala.Cr.App.), aff'd, *Ex parte Nettles*, 435 So.2d 151, 152-53 (Ala.1983) (Employment of a prospective juror by the victim of a crime, though not a party to the subsequent criminal prosecution, does not in itself give rise to an implied bias as a matter of law and, hence, does not provide a ground for automatic disqualification of the juror for cause).

#### III

[3] Lynn's motion for a random reduction of the jury panel to a level that would ensure that some blacks served on the jury was properly denied. While a defendant has a right to be tried by a jury whose members are selected "pursuant to nondiscriminatory criteria", *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717 ("a defendant has a right to a 'petit' jury composed in whole or in part of persons of his own race." *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717, quoting *Stradner v. West Virginia*, 19 Otto 303, 100 U.S. 303, 305, 25 L.Ed. 604 (1880)).

[4] Lynn's motion to allow two jury strikes for each strike received was properly denied, 462 U.S. 1137, 103 L.Ed.2d 1374 (1988).

[5] State Investigator properly permitted to describe of the rooms in the victim's house to testify that "they were ran" investigator's opinion was merely a statement of "shorthand rendition of fact". *Lowe v. State*, 377 So.2d 1102 (Ala.Cr.App.), cert. denied, *Ex parte Lowe*, 377 So.2d 1108 (Ala.1979). See *Lowe v. State*, 248 Ala. 304, 306 (1946). We view his use of "sacked" as merely a summary of the testimony and cumulative to the evidence of the condition of the rooms in the victim's house, especially the

#### VI

[6] The trial court did not direct the prosecutor to ask Herbert Bouier, "Do you know that [Marie Driggers Smith] was killed on May 5th of [1981]?" Since the date of the victim's death had already been established by the testimony of prior witnesses, that date was never a controlling factor in allowing the leading question. "[T]he trial judge has discretion in allowing the leading question, especially if the question is simply being asked to refresh the memory of the witness." *Brown Mechanical Contractors v. Centennial Ins. Co.*, 431 S.E.2d 303, 305 (Ala.1983). "Whether to allow a leading question is within the discretion of the trial court and except for a violation there will not be reversal." *Bradford v. Stanley*, 355 So.2d 644 (Ala.1978).

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VII

[7] In closing argument to the jury, the district attorney stated that, when accomplice Strong "laid it on the line on September 23, 1982, without any promising or any help from anybody and told me who pulled that trigger, I believed it." (Emphasis added.) Even if we consider this argument improper because it injects the prosecutor's personal opinion and knowledge into the case, *Clark v. State*, 462 So.2d 743, 746-48 (Ala.Cr.App.1984), the error was cured when the trial judge immediately instructed the jury that "the District Attorney's statement that he believes that particular part of the testimony is . . . improper, and I'll ask you to disregard that and not consider that in arriving at your verdict." *Chambers v. State*, 382 So.2d 632, 634 (Ala.Cr.App.), cert. denied, *Ex parte Chambers*, 382 So.2d 636 (Ala.1980).

VIII

Lynn raises four issues which this Court addressed on his first appeal. We have reviewed those alleged errors within the context of Lynn's second conviction and find that our prior opinion adequately answers each issue.

[6] The trial court did not err in allowing the prosecutor to ask state witness Herbert Bouier, "Do you know [Marie Driggers Smith] was killed on February 5th of [1981]?" Since the date of the victim's death had already been established by the testimony of prior witnesses and since that date was never a contested issue at trial, the trial court did not abuse its discretion in allowing the leading question. "[T]he trial judge has discretion to allow some leading questions, especially since prior testimony is simply being repeated." *Brown Mechanical Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932, 944 (Ala.1983). "Whether to allow or disallow a leading question is within the discretion of the trial court and except for a flagrant violation there will not be reversible error." *Bradford v. Stanley*, 355 So.2d 328, 331 (Ala.1978).

IX

Pursuant to A.R.A.P. Rule 45A, we have searched the record and found no error that has or probably has affected the substantial right of the appellant.

Furthermore, the witness testified that he was not familiar with the date. The following three considerations are made pursuant to the requirements of *Beck*

v. State

396 So.2d 645, 664 (Ala.1980). (1)

Lynn was indicted and convicted for an offense which is a capital offense by statutory definition. *Lynn*, 477 So.2d at 1380. (2) "Similar crimes are being punished capitally throughout Alabama." *Lynn*, 477 So.2d at 1380. See *Grayson v. State*, 479 So.2d 69 (Ala.Cr.App.1984), affirmed, *Ex parte Grayson*, 479 So.2d 76 (Ala.), cert. denied, *Grayson v. Alabama*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985) (nighttime burglary/intentional killing under § 13A-5-31(a)(4)); *Kennedy v. State*, 472 So.2d 1092 (Ala.Cr.App.1984), affirmed, *Ex parte Kennedy*, 472 So.2d 1106 (Ala.), cert. denied, *Kennedy v. Alabama*, 474 U.S. 975, 106 S.Ct. 346, 88 L.Ed.2d 325 (1985) (nighttime burglary/intentional killing under § 13A-5-31(a)(4)); *Cisby v. State*, 456 So.2d 95 (Ala.1983) (nighttime burglary/intentional killing under § 13A-5-31(a)(4)); *Lindsey v. State*, 456 So.2d 383 (Ala.Cr.App.1983), affirmed, *Ex parte Lindsey*, 456 So.2d 393 (Ala.1984), cert. denied, *Lindsey v. Alabama*, 470 U.S. 1023, 105 S.Ct. 1384, 84 L.Ed.2d 403 (1985) (burglary/murder under § 13A-5-40(a)(4)). (3) The death sentence is appropriate in relation to this appellant. See *Lynn*, 477 So.2d at 1380. As in the original trial, the trial judge again found the existence of only one aggravating and one mitigating circumstance. See *Lynn*, 477 So.2d at 1380.

[8] Pursuant to § 13A-5-53, Code of Alabama 1975, we make the following findings: (1) Other than the allegations of racial discrimination in the selection of the jury, see Issue I of this opinion, there is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. (2) Our independent weighing of the aggravating and mitigating circumstances indicates that death is the proper sentence. (3) The sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This cause is remanded to the Circuit Court of Barbour County for the reason stated in Issue I of this opinion.

REMANDED WITH DIRECTIONS.

All Judges concur.

#### ON RETURN TO REMAND

BOWEN, Presiding Judge.

(9) On remand, the trial court fully complied with the order of this Court. In consideration of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), an evidentiary hearing was held after which the trial court issued a written order in which it made the following findings of fact:

"1. That a prima facie case of purposeful discrimination was established by the fact that the strike list affirmatively shows that the prosecution struck all of the blacks from the venire. The Court then called on the prosecution for its reasons for its strikes.

"2. That the District Attorney, Sam A. LeMaire, Jr., explained the reasons that he struck every black from the jury and that each and every reason that he gave was race-neutral. Further, the reasons given were sufficient for any competent attorney to strike that particular venireman.

"3. The Court further finds that the testimony given by the District Attorney was truthful and that there was no purposeful racial discrimination involved in the selection of the jury that tried the above named defendant and the defendant is not entitled to a new trial, it is: "THEREFORE ORDERED that a new trial for the defendant Frederick Lynn be and the same is hereby denied."

At that hearing, the District Attorney testified, under oath, and the trial court allowed defense counsel to cross-examine the witness. The District Attorney's stated reasons for striking the eleven black persons from the jury venire are as follows: (1) The juror was the brother of a man the District Attorney had criminally prosecuted and convicted "on several occasions" and the brother against whom the District Attorney was "presently en port." (2) The juror's husband was twenty-five years old and be connected with drugs, a felony record and had b drug related offense. (3) in the same area of the lead defense counsel. (4) an area where the defendant the time of the crime and defendant's aunt and grandmother "numerous years." (5) A co-employee of the father Strong, an accomplice and a key witness against Strong had a "bad rep" pleaded guilty "to a crime with [the] crime" for which was being tried. If the Strong, he might not believe. Additionally, a small com involved and the juror's man The District Attorney had convicted eight people in the past eight years. The attorney suspected that the juror to one of those convicts was twenty-eight years old and lived close to a city in lead defense counsel was the mayor assisted defense during the jury. (7) The juror from co-defendant Strong. Attorney "felt that anyone [Strong] might doubt what even though he was under juror also lived in "a very strict" and might "not be as opposed to crime because of (8) The juror was a neighbor defendant's grandmother and a close proximity to the defendant crime was committed. (9) The friend of, and worked with, the father of the defendant. (10) year-old juror appeared "feeble hearing" and "somewhat weak qualifications." (11) The juror three years old, had a child co-defendant's Strong's brot

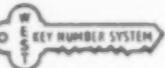
sions" and the brother of another man against whom the District Attorney's Office was "presently enforcing child support." (2) The juror's husband was related to the defendant's father. (3) The juror was twenty-five years old and "reputed to be connected with drugs." His father had a felony record and had been convicted of a drug related offense. The juror also lived in the same area of the county as did the lead defense counsel. (4) The juror lived in an area where the defendant was living at the time of the crime and where the defendant's aunt and grandmother had lived for "numerous years." (5) The juror was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a key witness against the defendant. Strong had a "bad reputation" and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. If the juror knew of Strong, he might not believe his testimony. Additionally, a small community was involved and the juror's name was Jackson. The District Attorney had prosecuted and convicted eight people named Jackson in the past eight years. The District Attorney suspected that the juror might be related to one of those convicts. (6) The juror was twenty-eight years old, unemployed, and lived close to a city magistrate. The lead defense counsel was the city clerk and the mayor assisted defense counsel in striking the jury. (7) The juror lived one block from co-defendant Strong. The District Attorney "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." The juror also lived in "a very high crime district" and might "not be as shocked or opposed to crime because of those things." (8) The juror was a neighbor of the defendant's grandmother and aunt and lived in close proximity to the defendant when the crime was committed. (9) The juror was a friend of, and worked with, the wife of the father of the defendant. (10) The eighty-year-old juror appeared "feeble and hard of hearing" and "somewhat weak on death qualifications." (11) The juror was twenty-three years old, had a child fathered by co-defendant's Strong's brother, and was

related by marriage to a state investigator who would testify as a witness. The investigator felt she would not be favorable to the State's case.

Our independent review of the record supports the findings of the trial court. The judgment of that court is affirmed.

OPINION EXTENDED; AFFIRMED.

All Judges concur.



Ex parte Frederick LYNN.

(Re Frederick Lynn

v.  
State).

86-1474.

Supreme Court of Alabama.

Dec. 30, 1988.

Defendant was convicted of capital murder by the Circuit Court, Barbour County, Jack W. Wallace, J. Defendant appealed. The Court of Criminal Appeals, 477 So.2d 1365, affirmed. On certiorari, the Supreme Court, 477 So.2d 1385, reversed and remanded. After remandment, the Court of Criminal Appeals, 477 So.2d 1388, reversed and remanded. On remand, defendant was retried, again convicted, and again sentenced to death. Defendant appealed. The Court of Criminal Appeals, 543 So.2d 704, reversed and remanded with directions to conduct evidentiary hearing on prosecutor's alleged use of racially discriminatory peremptory strikes. On remand, the Circuit Court determined that no purposeful discrimination was involved in the jury selection, and subsequently the Court of Criminal Appeals extended its opinion and affirmed. Writ of certiorari was issued. The Supreme Court, Steagall, J., held that: (1) finding that peremptory

App. 2  
DUPLICATE

COURT OF CRIMINAL APPEALS  
STATE OF ALABAMA  
P.O. BOX 351  
MONTGOMERY 36101

SAM TAYLOR  
Presiding Judge  
JOHN C. TYSON, III  
WILLIAM M. BOWEN, JR.  
JOHN PATTERSON  
H. WARD McMILLAN  
Judges

MOLLIE JORDAN  
Clark  
(205) 261-4880

Barbour (CC-83-24)

Circuit Court

State of Alabama

Appellee

4 Div. 698

Fredrick Lynn

Appellant

Dear Sir:

You are hereby notified that on July 28, 1987, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

- Notice of Appeal filed. Future correspondence should refer to the above number.
- Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: \_\_\_\_\_  
As to briefs, see Rules 28, 31 and 32, A.R.A.P.
- On motion, record on appeal accepted and considered as timely filed in this Court.
- Appellant granted seven (7) additional days to file brief. Brief due on \_\_\_\_\_.
- Appellee granted seven (7) additional days to file brief. Brief due on \_\_\_\_\_.
- Appellant granted seven (7) additional days to file reply brief. Brief due on \_\_\_\_\_.
- Brief of Appellant filed. \_\_\_\_\_ Oral argument requested by appellant.
- Reply brief filed.

to the Circuit  
for the reason  
pinion.  
RECTIONS.

## REMAND

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Our independent review of the record  
supports the findings of the trial court.  
The judgment of that court is affirmed.

## OPINION EXTENDED; AFFIRMED.

All Judges concur.



## Ex parte Frederick LYNN.

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appealed. The Court of Criminal Appeals,  
477 So.2d 1365, affirmed. On certiorari,  
the Supreme Court, 477 So.2d 1385, re-  
versed and remanded. After remandment,  
the Court of Criminal Appeals, 477 So.2d  
1388, reversed and remanded. On remand,  
defendant was retried, again convicted, and  
again sentenced to death. Defendant ap-  
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543 So.2d 704, reversed and remanded with  
directions to conduct evidentiary hearing  
on prosecutor's alleged use of racially dis-  
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mand, the Circuit Court determined that no  
purposeful discrimination was involved in  
the jury selection, and subsequently the  
Court of Criminal Appeals extended its  
opinion and affirmed. Writ of certiorari  
was issued. The Supreme Court, Steagall,  
J., held that: (1) finding that peremptory

strikes were not racially motivated was not  
clearly erroneous; (2) during the evidentiary  
hearing, defendant was not entitled to  
cross-examine district attorney as to venire-  
persons he did not strike; and (3) defendant  
was not entitled to proportionate mi-  
nority representation on jury.

Affirmed.

Maddox and Jones, JJ., concurred spe-  
cially and filed opinions.

Adams, J., dissented in part and con-  
curred in part.

## 1. Jury 423(5.1)

Prosecutor's explanation for use of  
peremptory strikes need not rise to level  
justifying exercise of challenge for cause.

## 2. Criminal Law 41158(3)

Jury 421

Trial court has discretion to determine  
if the State's peremptory challenges of  
black jurors are motivated by intentional  
racial discrimination; moreover, trial  
court's findings as to whether defendant  
has established purposeful racial discrimi-  
nation are to be accorded great deference  
on appeal and should be reversed only if  
they are clearly erroneous.

## 3. Jury 420

Trial court was not clearly erroneous  
in determining that prosecutor's peremptory  
strikes were not racially motivated; rea-  
sons given by prosecutor for the strikes  
were very specific and included the follow-  
ing: fact that one venireperson's husband  
was related to defendant, fact that another  
venireperson had been prosecuted several  
times by the prosecutor, and fact that one  
venireperson worked with codefendant's fa-  
ther.

## 4. Jury 423(5.1)

Result-oriented approach is not appro-  
priate when determining whether the State

1. A short synopsis of the underlying facts may  
be found in the opening paragraphs of the initial  
reported opinion of the Court of Criminal  
Appeals, *Lynn v. State*, 477 So.2d 1365, 1369  
(Ala.Cr.App.1984). A full account of the facts  
may be found in a written order of the trial

court issued following Lynn's original sentenc-  
ing in 1983. This order appears in its  
entirety as appended to the initial opinion of the  
Court of Criminal Appeals, id. at 1381-84.

2. Ala.Code 1975, § 13A-5-3(a)(1)

has presented sufficient race-neutral rea-  
sons for its peremptory challenges.

## 5. Jury 421

Defendant was not entitled to cross-ex-  
amine district attorney as to venirepersons  
he did not strike, in evidentiary hearing on  
district attorney's alleged use of racially  
discriminatory peremptory jury strikes in  
capital murder prosecution.

## 6. Jury 423(1.1)

Minority criminal defendant is not enti-  
tled to proportionate minority representa-  
tion on jury in counties that have signifi-  
cant minority population.

Donald J. McKinnon, Eufaula, for petition-  
er.

Don Siegelman, Atty. Gen., and P. David  
Bjurberg and William D. Little, Asst. At-  
tys. Gen., for respondent.

## STEAGALL, Justice.

We issued the writ of certiorari to review  
the decision of the Court of Criminal Ap-  
peals in *Lynn v. State*, 543 So.2d 704 (Ala.  
Crim.App.1987), which affirmed Lynn's  
conviction for capital murder and the trial  
court's imposition of the death sentence.  
The writ was issued as a matter of right  
pursuant to Rule 39(c), A.R.App.P.

The facts of this case have been thor-  
oughly set forth in previous opinions.<sup>1</sup>  
Suffice it to say that in 1983, 16-year-old  
Frederick Lynn was convicted in the Circuit  
Court of Barbour County and was sen-  
tenced to death for the capital offense in-  
volving burglary and the murder of Marie  
Driggers Smith.<sup>2</sup> The conviction and sen-  
tence were initially affirmed by the Court  
of Criminal Appeals, *Lynn v. State*, 477  
So.2d 1365 (Ala.Crim.App.1984), but were  
then reversed by this Court, *Ex parte*

3. In that decision, this Court held  
that Lynn's original sentence  
was required based upon the trial  
of the State's motion in limine  
to exclude any inquiry for impeachment  
by defense counsel concerning  
record of a prosecution witness (Gale  
Strong) who was also an admitted a  
member of the jury venire. 1

Lynn, 477 So.2d 1385 (1987). Lynn was retried  
and again sentenced to death by the Court of Criminal  
Appeals. Lynn appealed to the Alabama Supreme  
Court, which affirmed Lynn's conviction and death  
sentence. Lynn v. State, 543 So.2d 704 (Ala. Crim.  
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Lynn, 477 So.2d 1385 (Ala. 1985).<sup>3</sup> On remand Lynn was retried, again convicted, and again sentenced to death. On appeal, the Court of Criminal Appeals remanded the cause to the Circuit Court of Barbour County with directions to conduct an evidentiary hearing on the prosecutor's alleged use of racially discriminatory peremptory jury strikes. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). On remand, the trial court conducted such a hearing, finding that although a *prima facie* case of purposeful discrimination was established, in that the prosecution struck all blacks from the jury venire, the reasons advanced by the prosecutor for the strikes were race-neutral and therefore rebutted the *prima facie* case. Determining that no purposeful discrimination was involved in the selection of the jury, the trial court accordingly concluded that Lynn was not entitled to a new trial. On return to remand, the Court of Criminal Appeals extended its opinion and affirmed the judgment of the trial court.<sup>4</sup> Lynn's petition in this Court followed.

## I

As previously indicated, the Court of Criminal Appeals, on return to remand, accepted the findings of the trial court that the prosecutor's peremptory jury strikes were not racially motivated. Lynn contends that those findings are erroneous and are due to be reversed under the rationale of *Batson v. Kentucky*, *supra*.

At the hearing on remand, the district attorney, testifying under oath, set forth his reasons for the use of each of his peremptory strikes of black venirepersons. Lynn asserts that those reasons are insufficient under the holding of *Batson*, *supra*, because the reasons given, he says, are inherently vague and could apply to any member of the jury venire. Lynn, more-

<sup>3</sup> In that decision, this Court held that reversal was required based upon the trial court's granting of the State's motion *in limine*, which precluded any inquiry for impeachment purposes by defense counsel concerning the juvenile record of a prosecution witness (Garrett Marcus Strong) who was also a admitted accomplice to the crime.

<sup>4</sup> Because the hearing on remand in this case complies procedurally with *Batson*, *supra*, a second hearing under the criteria established by this Court in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), is not required. *Scales v. State*, 537 So.2d 1074 (Ala. 1986).

On cross-examination by defense counsel, no inconsistency was revealed between the district attorney's stated reasons in this case and his practice in striking generally. The district attorney also testified that he "struck around" certain people that he trusted and wanted on the jury.

[1-4] Although Lynn argues that the reasons the district attorney gave for his peremptory strikes of three venirepersons are suspect, we note that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, *supra*, 476 U.S. at 97, 106 S.Ct. at 1723. It is within the sound discretion of the trial court to determine if the State's peremptory challenges of black jurors are motivated by intentional racial discrimination, and we decline to adopt it. We conclude that the trial court did not err in refusing to permit Lynn to cross-examine the district attorney as to venirepersons he did not strike.

## III

[6] Lynn's third argument is that the trial court erred in denying his motion that the court order the district attorney not to use his peremptory strikes in such a manner as to exclude all blacks from the jury. Lynn proposes that this Court adopt a rule that would require, for the benefit of minority criminal defendants, proportionate minority representation on juries in counties that have a significant minority population.

Based on the foregoing, we find no "clear error" in the trial court's determination. Moreover, we decline to articulate the mechanical result-oriented approach urged by Lynn, for such a procedure is not contemplated by the holding in *Batson*, *supra*.

## II

[5] Lynn next argues that the sincerity of the race neutral reasons advanced by the district attorney to justify his strikes of prospective black jurors cannot be fully evaluated by the trial court in the absence of extensive cross-examination by defense counsel. This assignment of error is predicated on the trial court's disallowance of two questions, one in part and the other in

5. The defense attorney's question that was disallowed in part by the trial court was as follows:

"Q: All right. Now among the individual that you did not strike, were there not some whose relatives you had prosecuted?"

The trial court limited this question to those persons who served on the jury. The question

its entirety, directed to the district attorney on cross-examination.

Although the trial court permitted full cross-examination of the district attorney regarding the persons who actually served on the jury, it disallowed questions as to whether the same reasons advanced by the district attorney for striking certain blacks would be applicable to potential jurors struck by the defendant.<sup>5</sup> Lynn thus argues that prosecutors should be required not only to give specific reasons for striking potential black jurors, but also to demonstrate why certain venirepersons were not struck. Such a right of unlimited cross-examination would be a substantial expansion of the holding in *Batson*, *supra*, and we decline to adopt it. We conclude that the trial court did not err in refusing to permit Lynn to cross-examine the district attorney as to venirepersons he did not strike.

## IV-XIV

The remaining issues Ly substantially the same issues presented to the Court of Cr We have carefully reviewed thoroughly scrutinized the h Court of Criminal Appeals, a the propriety of the death p case pursuant to Ala. § 13A-5-53(a). We find that t errors adversely affecting L

Accordingly, the judgment of Criminal Appeals is due to AFFIRMED.

TORBERT, C.J., and ALMO SHORES and HOUSTON, JJ.,

MADDOX and JONES, JJ., specially.

ADAMS, J., dissents as to I but concurs as to the remaind the opinion.

MADDOX, Justice (concurring specially).

The law reads as follows:

"After a *prima facie* case is established, there is a presumption that peremptory challenges were used in a discriminatory manner against black jurors. . . . The state then has the burden of showing that the challenge was made for a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and is not discriminatory." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. How showing need not rise to the level of a *prima facie* case.

*Jackson*, [516 So.2d 768 (Ala. 1986)] j; [State v.] Neil, 2d [481] at 487 [(1984)]; [People v.] Wheeler, 22 Cal.3d [258] at 28, 582 P.2d [748] at 765, 148 Cal Rptr. 906 [(1978)].

\* \* \*

1719, quoting *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879). Therefore, Lynn's motion was correctly denied, and we decline to adopt the proportionate representation rule Lynn urges.

IV-XIV

The remaining issues Lynn raises are substantially the same issues that were presented to the Court of Criminal Appeals. We have carefully reviewed the record, thoroughly scrutinized the holding of the Court of Criminal Appeals, and considered the propriety of the death penalty in this case pursuant to Ala.Code § 1975, § 13A-5-53(a). We find that there were no errors adversely affecting Lynn's rights.

Accordingly, the judgment of the Court of Criminal Appeals is due to be affirmed.

AFFIRMED.

TORBERT, C.J., and ALMON,  
SHORES and HOUSTON, JJ., concur.

MADDOX and JONES, JJ., concur specially.

ADAMS, J., dissents as to Part I but concurs as to the remainder of the opinion.

MADDOX, Justice (concurring specially).

The law reads as follows:

"After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. The state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. *Jackson*, [516 So.2d 768 (Ala. 1986)]; [State v.] Neil, 451 So.2d [481] at 487 [(1984)]; [People v.] Wheeler, 22 Cal.3d [252] at 281-82, 583 P.2d [748] at 765, 148 Cal.Rptr. [890] at 906 [(1978)].

In view of this finding by the trial judge, I agree with the result reached, because the Supreme Court of the United States, in *Batson*, in footnote 21, 476 U.S. at 98, 106 S.Ct. at 1724, did state that "[s]ince the

"Batson makes it clear . . . that [the State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Batson*, 476 U.S. at 94, 106 S.Ct. at 1721, citing *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. Finally, a prosecutor cannot overcome the presumption merely by denying any discriminatory motive or "affirming his good faith in individual selections." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1723, citing *Alexander*, 405 U.S. at 632, 92 S.Ct. at 1226." (Emphasis added.)

*Ex parte Branch*, 526 So.2d 609, 623 (Ala. 1987).

I was almost persuaded to dissent in this case because it appeared that the State had failed to meet its burden of giving "clear, specific and legitimate" reasons for challenging several black persons on the venire. I concur in the result only because I am not convinced that the prosecutor and the trial judge failed to carry out their responsibilities under *Batson*. Also, after the state gave its reasons for the challenges, the petitioner failed to show that other venire persons having the same characteristics were not challenged.

The record shows that the prosecutor, under oath, stated that he had no discriminatory purpose when he exercised his peremptory challenge, and the trial court specifically found that "the testimony given by the District Attorney was truthful" and that there was no purposeful racial discrimination involved in the selection of the jury that tried [the case]."

In view of this finding by the trial judge, I agree with the result reached, because the Supreme Court of the United States, in *Batson*, in footnote 21, 476 U.S. at 98, 106 S.Ct. at 1724, did state that "[s]ince the

trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference" (emphasis added).

I must hasten to add, however, that compliance in this case was, at most, minimal. Some of the reasons given by the district attorney are somewhat similar to those set out by Mr. Justice Marshall in his special concurring opinion in *Batson*, where he expressed fears that the *Batson* mandate might not be followed by prosecutors and trial judges. Mr. Justice Powell tried to assuage Mr. Justice Marshall's fears. In footnote 21, 476 U.S. at 98, 106 S.Ct. at 1724, he wrote that ordinarily "great deference" should be given to the findings of fact made by the trial judge, and he addressed the concerns expressed by Mr. Justice Marshall. However, the trial court did not enforce *Batson*, by not following in footnote 22, 476 U.S. at 100, 106 S.Ct. at 1726.

While we respect the views expressed in Mr. Justice Marshall's concurring opinion, we believe that trial judges and prosecutors should not be allowed to make any excuse for striking black jurors. The standard we apply to the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any juror because of his race. We have come to believe that prosecutors will fulfill their duty to exercise their challenges only for legitimate purposes. Obviously, this Court may assume that trial judges, in supervising voir dire in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."

It is apparent that the United States Supreme Court expressed great confidence that prosecutors and trial judges would "perform conscientiously their respective duties under the Constitution"—and the loss will be a tragedy, for the "peremptory challenge" procedure,

We note that the majority opinion omits the

duties under the Constitution," and I share that confidence.

While some of the race-neutral reasons stated by the prosecutor in this case are not as clear and specific as they might have been, and while some of them are quite similar to the examples set out by Mr. Justice Marshall in his special concurring opinion in *Batson*, I cannot say that the trial judge was clearly wrong in denying the petitioner a new trial. But I must point out again that I believe that this case only minimally complies with the requirements of *Batson*, because there was very little voir dire directed to the challenged black jurors and therefore very little to indicate that they might be partial to the petitioner other than that they shared the same race. In this connection, let me say that I believe the Supreme Court, in *Batson*, placed particular emphasis on the value of voir dire in determining whether race-neutral reasons are sufficient to support a procedural challenge. I would further point out that counsel for petitioner specifically argued that the trial judge limit the total number of challenges to 26—the minimum required by law—~~in order to limit the number of peremptory challenges available to the state.~~

JONES, Justice (concurring specially).

I agree completely with Justice Maddox's concurring opinion. I write separately to raise a "red flag": If the prosecuting attorneys for this State celebrate this opinion of significance in this case as a victory and had not the obvious warnings, the ultimate result, in the not too distant future, will be the loss of all peremptory challenges in the criminal jury selection process.

This case, along with scores of others of like import, will furnish the requisite empirical data to prove Justice Marshall's worst fears and to make a mockery of Justice Powell's confidence that trial judges and prosecutors would "perform conscientiously their respective duties under the Constitution."

It is apparent that the United States Supreme Court expressed great confidence that prosecutors and trial judges would "perform conscientiously their respective duties under the Constitution"—and the loss will be a tragedy, for the "peremptory challenge" procedure,

word "ordinarily" from its statement of the rule.

properly exercised, for best hope of insuring a trial. But it will, and did *Snow v. Alabama*, S.Ct. 824, 18 L.Ed.2d 10, not *Batson*'s "one that bornly persist in "living

How long, oh, how long the hollow notion that is likely to convict criminals defendants than are white defendants? But and accept reality, we el game" of circumvention of a valuable and good practice of jury selection. Our obvious responsibility with this Court, but with who must communicate; that's one of the "bright pieces" grounds for trial and, thus, other trials, convicted trial juries, which are the last to give a good jury, which is a conviction.



Truman SEAL

v.

STATE

8 So.2d 10

Court of Criminal Appeals

May 12, 1987

Rehearing Denied Jr.

Defendant convicted offenses petitioned for writ of habeas corpus. The Circuit Court, Howard Bryan, J., den hearing, and petitioner Court of Criminal Appeal held that issue of sentencing potentially meritorious, presented to trial court at

HARMON v. STATE

Cite as 543 So.2d 715 (Ala.Cr.App. 1987)

4 715

properly exercised, furnishes the ultimate best hope of insuring a fair and impartial trial. But it will, and should, give way, as did *Semin v. Alabama*, 380 U.S. 202, 85 S.Ct. 224, 13 L.Ed.2d 759 (1965), if we heed Justice's "one last chance" and stubbornly persist in "doing business as usual."

~~How long can we persist in the belief that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants? Rather than to face and accept reality, we choose to "play the game" of disavowal and risk the loss of a venerable and traditionally accepted system of jury selection.~~

In the final analysis, the answer lies not with this Court, but with the trial judges, who must make the decision as to the prosecutor's use of the "innocent judgment or sentence" grounds for striking black jurors from a jury panel, a morally balanced and impartial jury. It is the trial judges who are the last bastion of hope to preserve a good jury selection system and still maintain a moral trial.



HARMON

v.

STATE

Case No. 6 Div. 109.

Court of Criminal Appeals of Alabama.

May 12, 1987.

Rehearing Denied June 9, 1987

Defendant convicted of various offenses petitioned for writ of error coram nobis. The Circuit Court, Randolph County, Howard Bryan, J., denied petition after hearing, and petitioner appealed. The Court of Criminal Appeals, Patterson, J., held that issue of sentencing error, though potentially meritorious, had not been presented to trial court either in petition or

in hearing and was thus not before Court for review.

Affirmed.

Judgment reversed, Ala., 543 So.2d 716, on remand, Ala.Cr.App., 543 So.2d 717.

Criminal Law #1064(1)

Issue of sentencing court's error in imposing separate consecutive sentences on joint indictment when both charges stemmed from same act and one was part of the other, though potentially meritorious, had not been presented to trial court in petition for writ of error coram nobis or at hearing thereon and thus was not before Court of Criminal Appeals for review.

Charles Ned Wright, Wedowee, for appellant.

Charles A. Graddick, Atty. Gen., and Ruth Shadix Fox, Asst. Atty. Gen., for appellee.

PATTERSON, Judge.

The appellant, Trenman Harmon, appeals from the trial court's denial, after a hearing, of his petition for writ of error coram nobis wherein he contested the validity of his 1985 convictions for escape in the second degree, burglary in the third degree, and theft of property in the second degree, entered pursuant to plea of guilty. On appeal, his appointed counsel submitted the following issue for our review:

"Whether the Court erred in sentencing the Defendant to separate sentences of thirteen years each (running consecutive) for Third Degree Burglary and Second Degree Theft on a joint indictment when both charges stemmed from the same act and the Second Degree Theft was a part of the Third Degree Burglary offense to the prejudice of the Defendant."

If the factual allegations are in fact true, this issue, if properly raised, could have merit. Compare *Myers v. State*, 499 So.2d 820 (Ala.Cr.App.1986) (wherein the court held that the issue of whether former theft convictions barred a subsequent burglary conviction arising out of the same act is

MAILING ADDRESS:

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OFFICE OF  
CLERK OF THE SUPREME COURT  
STATE OF ALABAMA  
MONTGOMERY

App.4

TELEPHONE: 205-4608

Re: 86-1474  
Ex parte Frederick Lynn  
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS  
(Re: Frederick Lynn) vs. State  
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

- Appeal docketed. Future correspondence should refer to the above number.  
Court Reporter granted additional time to file reporter's transcript to and including  
Clerk/Register granted additional time to file clerk's record/record on appeal to and including  
Appellant granted 7 additional days to file briefs to and including  
Appellant(s) granted 7 additional days to file reply briefs to and including  
Record on Appeal filed  
Appendix Filed  
Submitted on Briefs  
Petition for Writ of Certiorari denied. No opinion.  
XXXX Application for rehearing overruled. No opinion written on rehearing.  
Steagall, J. - Hornsby, C.J., Maddox, Jones, Almon, Shores and Houston, J.J., concur; Adams, J., dissents.

7/14/89  
bsa

*Robert G. Esdale*

Robert G. Esdale, Clerk  
Supreme Court of Alabama

1 STATE OF ALABAMA  
 2 IN THE CIRCUIT COURT FOR THE COUNTY OF BARBOUR  
 3 THIRD JUDICIAL CIRCUIT  
 4 CRIMINAL

5  
 6 STATE OF ALABAMA, ]  
 7 PLAINTIFF, ]  
 8 - VS - ]  
 9 FREDRICK LYNN, ]  
 10 DEFENDANT. ]

11 REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

12 BEFORE:

13 HON. WILLIAM H. ROBERTSON, CIRCUIT JUDGE  
 14 EUFAULA, ALABAMA - WEDNESDAY, MAY 13, 1987

15 TIME: 9:03 A.M.

16 A P P E A R A N C E S

17 FOR THE STATE: HON. SAM A. LeMAISTRE, JR.  
 18 DISTRICT ATTORNEY  
 19 THIRD JUDICIAL CIRCUIT  
 20 EUFAULA, ALABAMA

21 FOR THE DEFENDANT: HON. DONALD J. MCKINNON  
 22 ATTORNEY-AT-LAW  
 23 224 EAST BROAD STREET  
 24 EUFAULA, ALABAMA

25 COURT REPORTER: HON. ANDREW J. CLINGAN, JR., RPR  
 26 THIRD JUDICIAL CIRCUIT  
 27 2d FLOOR - COURTHOUSE  
 28 EUFAULA, ALABAMA

| <u>I N D E X</u> |                                                     |                   |                  |
|------------------|-----------------------------------------------------|-------------------|------------------|
| 3                | <u>STATE'S WITNESSES:</u>                           | <u>DIR. EXAM.</u> | <u>CR. EXAM.</u> |
| 4                | Sam A. LeMaistre, Jr.                               | 4                 | 14               |
| 5                |                                                     |                   |                  |
| 6                | <u>DEFENDANT'S WITNESSES:</u>                       |                   |                  |
| 7                | Donald J. McKinnon                                  | 30                | --               |
| 8                | Court Reporter's Certificat of Completion . . . . . | 34                |                  |
| 9                |                                                     |                   |                  |
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1           EVIDENTIARY HEARING ON ALLEGATION  
2           OF PURPOSEFUL DISCRIMINATION

3           MORNING SESSION - WEDNESDAY, MAY 13, 1987 - 9:03 A.M.

4           WHEREUPON, the following proceedings were had and  
5           entered of record as follows, to-wit:

6           THE COURT: I call the case of State of Alabama  
7           versus Fredrick Lynn, case number CC-83-24.

8           This case has been sent back on remand to  
9           this court from the Alabama Court of Criminal Appeals  
10          directing this Court to conduct a hearing to determine  
11          whether or not the district attorney's strikes established  
12          a case of purposeful discrimination against blacks. The  
13          Court directed that the defendant prove a prima facie case  
14          in court, examine the records, and the strikes of the dis-  
15          trict attorney, -- Where is the district attorney? -- and  
16          the Court stated -- the Court of Criminal Appeals directed  
17          this court to have an evidentiary hearing to determine  
18          whether or not the case of purposeful discrimination was  
19          practiced by the district attorney in his striking of the  
20          jury in this case. And in its order the court stated that  
21          the defendant should prove a prima facie case of discrimi-  
22          nation of purposeful discrimination.

23           The Court has examined the jury strike list  
24          that was used by the or struck from by the plaintiff and  
25          defendant and determined that the district attorney struck

1           all the blacks in the venire with the exception of one who  
2           was left on as an alternate and the defendant didn't strike  
3           any blacks from the jury; so, therefore, I'm ruling that  
4           the defendant does not have to prove a prima facie case, and  
5           the burden is now on the State to prove that those strikes  
6           were not racially motivated.

7           With that is the defendant ready?

8           MR. MCKINNON: Yes, your Honor.

9           THE COURT: Is the State ready?

10          MR. LeMAISTRE: Yes.

11          THE COURT: Mr. LeMaistre, you may proceed.

12          MR. LeMAISTRE: From here, your Honor (Indicating  
13           the lectern)?

14          THE COURT: Yes, or wherever you will be more  
15           comfortable.

16          MR. MCKINNON: Your Honor, he needs to be sworn.

17          SAM A. LeMAISTRE, JR.

18          the district attorney herein, after first having been duly  
19          sworn, testified as follows:

20          MR. LeMAISTRE: Judge, just to make sure we are  
21          all looking at the same list the strike list that I have is  
22          two pages in length, forty-two names. That is on the front  
23          and back.

24          THE COURT: Yes, sir.

25          MR. LeMAISTRE: All right, sir.

1 THE COURT: It is dated "Jury List, Eufaula,  
2 Spring Term, 1986," which the Court will mark as State's  
3 Exhibit 1 for the purposes of this hearing.

4 MR. LeMAISTRE: Yes, sir.

5 THE COURT: And which will be admitted into evi-  
6 dence if there is no objection from the defendant.

7 MR. McKINNON: No objection, your Honor.

8 THE COURT: All right.

9 MR. LeMAISTRE: Your Honor, what the State would  
10 like to do this morning in answering the motion or the pre-  
11 sumption that has been put forth by the defendant, I would  
12 like to go through the strikes beginning with my first  
13 strike and ending with my last, and provide you the reasons  
14 that I struck any black persons that I may have struck.

15 THE COURT: That is fine with the Court. Does  
16 that suit the defendant?

17 MR. McKINNON: Yes, your Honor.

18 THE COURT: If you want to reserve your right  
19 to cross-examine until he gets through with all his reasons  
20 then you can pick out any particular one that you want to  
21 question him about.

22 MR. McKINNON: Yes, your Honor.

23 THE COURT: All right.

24 MR. LeMAISTRE: Judge, my record reflects that my  
25 first strike was number 2 on the venire list, Timothy

1 Blackshire. He is twenty-eight or was twenty-eight years  
2 old last April when this trial was had. He is the brother  
3 of Bobby Blackshire who I prosecuted criminally on several  
4 occasions, and have convicted, and had sent to the peniten-  
5 tiary. He is the brother of Willie Blackshire who my office  
6 is presently enforcing a child -- a court ordered child  
7 support, and for that reason, your Honor, we felt that he  
8 was, perhaps, about to be prejudiced against me or the  
9 State's position, and that is the reason we struck him.

10 My second strike was number 23, Mamie R.  
11 Lindsey. Ms. Lindsey is a black female. She was thirty  
12 years old at the time.

13 Under voir dire questioning she indicated or  
14 stated that her husband is related to the defendant, in that  
15 case Fredrick Lynn's father, who is Frazier Farror, and  
16 for that reason we elected to strike her.

17 My third strike was number 11, Larry B.  
18 Farmer, black male, age twenty-five at the time. He was  
19 young which we did not feel would be favorable to a con-  
20 viction and sentence of death assuming we got a conviction.  
21 He was at the time reputed to be connected with drugs. That  
22 information had come to me through various law enforcement  
23 agencies, such as the sheriff's department. His father,  
24 Clemmon Farmer with whom he was living had a previous  
25 felony record of violence out of Florida, and since that

R-7

1 date has been convicted of drug related offense. That  
2 added credence to our beliefs that he was at that time con-  
3 nected in the drug business.

4 His address that was given with the -- with  
5 his name here on the strike list indicates a Midway route  
6 which is an area of Barbour County where Mr. Don McKinnon,  
7 the lead defense attorney, is from, and I was not very  
8 familiar with Mr. Farmer other than what had been repeated  
9 to me, and I felt he might know Mr. McKinnon and might be  
10 favorable to his position.

11 My fourth strike was Robert J. Thornton,  
12 fifty-nine-year-old-black male. He lives on the Gammage  
13 Road in an area where the defendant, Fredrick Lynn, was  
14 living at the time of this crime, and also where Ms.  
15 Rency Lynn and Ms. Alvester Lampley, who are the defendant's  
16 grandmother and aunt, respectively, have lived for numerous  
17 years. I felt that friendship would possibly be there that  
18 would bias him, and for that reason we struck him.

19 My next strike was number 19, Jim H. Jackson.  
20 He is a black male, age thirty-five. He lives on Cotton  
21 Avenue in Eufaula. He was a co-employee of Sims Strong, at  
22 one time Sims Strong being the father of the accomplice and  
23 co-defendant, Gary Marcus Strong, who was a key witness in  
24 this prosecution against Fredrick Lynn.

25 Without question, we did not attempt to

1 portray him as a fine young man. Gary Marcus Strong has a  
2 bad reputation of his own. He pled guilty to a crime in  
3 connection with this crime that we tried Fredrick Lynn for;  
4 thus, we did not want anyone that might know Gary Marcus  
5 Strong's bad reputation and bad background on the venire for  
6 fear that they would not believe his testimony. Additionally,  
7 a person who was not on the venire named Gary Jackson, with  
8 the same last name, came forward before the trial of the  
9 case and offered information about what two prospective  
10 veniremen may have said concerning their feelings about  
11 Fredrick Lynn. I did not know whether Gary Jackson and Jim  
12 H. Jackson were related but that was an additional factor  
13 that came into play in my decision to strike Jim H. Jackson.

14 Additionally, your Honor, and I would like  
15 to address this at length when I'm through with the people  
16 that I struck; but, at this point in relation to this person  
17 I would like to say that this Court is certainly aware, but  
18 assuming we get a favorable ruling, I would like any future  
19 court to review that this is a very small community with a  
20 population of twenty-five thousand people of which over  
21 twelve thousand five hundred live in the Eufaula area and  
22 would have been potential jurors. I have prosecuted here  
23 for eight years as district attorney and four years prior  
24 to that as assistant district attorney. I have prosecuted  
25 Leroy Jackson, Barbara Jackson, Rozell Jackson, Harry

1 Jackson, James Jackson, Johnny Jackson, Larry Jackson, and  
2 Arlene Jackson, all of them, have been convicted of one  
3 crime or another of a felony nature. And with that last  
4 name, although it is common, all of these people I've just  
5 named are black also, and I was not comfortable without  
6 knowing that they were not related to any of these people  
7 whether they would be favorable to me and the State and  
8 would be willing to give the State a fair trial. And those  
9 are the reasons that I struck Jim H. Jackson.

10 My next strike, which I believe was my sixth  
11 strike, was number 42, Rose M. Wright, black female, age  
12 twenty-eight at the time. Again, she was young, she was un-  
13 employed, two factors that I did not feel would be favorable  
14 to a verdict of guilt and a sentence of death, which is  
15 what the State was looking for.

16 She lived near or within a block or block  
17 and a half of Peggy Wright who has the same last name. Ms.  
18 Wright is a city magistrate, and was so at the time of this  
19 trial. At the time of this trial, your Honor, Mr. McKinnon  
20 was the city clerk of the City of Eufaula where Ms. Wright  
21 was the city magistrate. And Mayor E.H. Graves, who is now  
22 deceased, although he didn't participate in the trial it is  
23 my belief that he assisted in the striking of this jury or  
24 assisted Mr. McKinnon and Mr. Gaither in determining who  
25 they would like to strike. Because of Ms. Wright's position

1 with the city, and because of the fact that I did not know  
2 whether Rose M. Wright is related, in addition to her being  
3 unemployed and young, we chose to strike her. And that  
4 certainly is not meant to say that Ms. Rose M. Wright or  
5 Ms. Peggy Wright would have done anything improper, but it  
6 is something that goes into the thinking of either party,  
7 and certainly went into my thinking that a city clerk who is  
8 the lead defense counsel, and a mayor at the time, Mayor  
9 Hamp Graves, assisting in the striking of that jury, I did  
10 not want anyone connected with the city sitting on that  
11 jury.

12 The next strike that I took was number 36,  
13 Ms. Rochella Streeter. She is age thirty-three, black,  
14 female. She lives in Chattahoochee Courts in an apartment  
15 and lives on, I believe, "C" Street. Gary Marcus Strong,  
16 the co-defendant, accomplice, and key witness in this pro-  
17 secution, as I've previously testified, lived on "D" Street  
18 approximately one block away. I felt that she would know  
19 Gary Marcus Strong, and, again, because we understood that  
20 Gary Marcus Strong was not a person of fine moral character  
21 we felt that anyone that knew him might doubt what he was  
22 telling even though he was under oath. And that is one  
23 reason that we struck Ms. Streeter.

24 We also struck Ms. Streeter because she comes  
25 from a very high crime district here in Eufaula. And it is

1 our belief -- it is my belief that persons in high crime  
2 districts may not be as shocked or opposed to crime because  
3 those things just happen in those neighborhoods more than  
4 others. And those are the reasons we struck Ms. Streeter.

5 My next strike was Ms. Helen D. Morris,  
6 number 26 on the list. She was fifty-two at the time of  
7 trial. She also lives on Gammage Road and was a neighbor  
8 to Ms. Rency Lynn who is the defendant's grandmother and  
9 also Alvester Lampley who is the defendant's aunt, and also  
10 was living in close proximity to the defendant who was  
11 living with his grandmother and aunt at the time of the  
12 crime. We felt the possibility of knowing these people  
13 might affect her fairness, and for that reason we struck  
14 her.

15 THE COURT: Mr. LeMaistre, let me interrupt you.  
16 I believe your next strike after Ms. Streeter was Mrs. Myrna  
17 A. Clayton, which is number 7. She was a white female, and  
18 you need to give us the reason for that one.

19 MR. LEMAISTRE: Excuse me, your Honor. In pre-  
20 paration for this trial -- you are correct -- I was just  
21 preparing for the strikes that had to be explained as  
22 according to the Supreme Court and other courts. You are  
23 correct.

24 My strike after Ms. Streeter was Ms. Myrna  
25 A. Clayton. She is a white female. My ninth strike was

1 Ms. Helen Morris. Thank you, Judge, and I've just given  
2 you the reasons that we struck her.

3 My tenth strike was Mrs. Mary Alice Scott.  
4 She stated that she was a friend of -- she is a black  
5 female, age thirty-nine at the time of this trial. She  
6 stated she was a friend of Frazier Farrior's wife, and she  
7 works with her. Frazier Farrior, again, for the Court is  
8 the defendant's father, and for that reason we struck her.

9 My eleventh strike was Ms. Judy T. Butler,  
10 number 6 on the list. She is a white female.

11 My next strike, State's twelfth strike, num-  
12 ber 8, Rhonda M. Cotton. She is also a white female.

13 My thirteenth strike was number 20, Will  
14 Jacob, Jr. Mr. Jacob was eighty years old at the time of  
15 the trying of this case. As well as obviously being elderly  
16 he appeared somewhat feeble and hard of hearing. I was con-  
17 cerned about his ability to withstand the rigors of what I  
18 knew to be a two- to three-day trial. I was also afraid he  
19 could not remain attentive throughout that time period. And  
20 I think in a case of this magnitude it is vitally important  
21 that we have jurors that listen attentively and hear every-  
22 thing that is said for either the State or the defense.  
23 Additionally, if my recollection serves me correctly, he  
24 was somewhat weak on death qualifications although he did  
25 say he could convict if the evidence was there. He was not

1 someone that should be challenged for cause but his re-  
2 sponses were not what I felt the State would like to have  
3 in that case.

4 My last strike, State's fourteenth, was num-  
5 ber 10, Jo Ann Dinkins. She is twenty-three. Again, she  
6 is young which we did not prefer to have on the jury if we  
7 could avoid it. She has a child that's fathered by co-  
8 defendant's, Gary Marcus Strong's, brother which, again,  
9 would conclude me to believe that she knew of Gary Marcus  
10 Strong, knew of his bad character. And, again, we did not  
11 want a person on the jury that would tend to disbelieve what  
12 turned out to be our key witness in the case. She is also  
13 related to Investigator Early Dinkins who was also a witness  
14 in this case by marriage. But, by her admission, and what  
15 Mr. Dinkins told me prior to the trial of the case, they did  
16 not associate with one another. Mr. Dinkins stated to me he  
17 felt she would not be favorable to the State's case. Ad-  
18 ditionally, she was a classmate of Gary Marcus Strong; so,  
19 again, she did know him. And as I've stated, your Honor,  
20 there is no question of Gary Marcus Strong being -- he was  
21 a person of bad character. And we just wanted to avoid  
22 people that might tend to disbelieve him although he was  
23 under oath.

24 Judge, those are the strikes of black persons  
25 that the State took in the trial of this case, State versus

1 Fredrick Lynn, that was held, I believe, on April 1st, 1986,  
2 or which began on that date.

3 I'm a little unfamiliar with the entire  
4 proceedings here. I'll let Mr. McKinnon, if that is ap-  
5 propiate, cross me on anything he would like, but I would  
6 like the right to reserve some comments at the end concern-  
7 ing this procedure.

8 THE COURT: Yes, certainly.

9 And if he is going to cross you, I guess the  
10 thing to do is take Mr. Crawford's place in the witness  
11 stand.

12 CROSS-EXAMINATION

13 BY MR. MCKINNON:

14 Q Let me see. Mr. LeMaistre, in reference to your first  
15 strike, Timothy Blackshire, at the time of the trial,  
16 and at the time that the jury was selected, did you  
17 know that he was the brother of Bobby Blackshire?

18 A Yes, sir.

19 Q And did you know that he was a brother of Willie Black-  
20 shire?

21 A Yes, sir.\* I knew prior to that that Willie and Bobby  
22 are brothers, and learned that Timonty was their bro-  
23 ther prior to the striking of this jury.

24 THE COURT: Mr. LeMaistre, in order to strike the  
25 jury did you know all the facts that you

1                   stated on your direct testimony before this  
2                   jury was struck?

3                   MR. LeMAISTRE: Yes, sir.

4                   THE COURT: Okay. Mr. McKinnon, you can do away  
5                   with all such questions as that. He testi-  
6                   fied under oath he knew everything that he  
7                   said before the trial.

8                   MR. MCKINNON: All right.

9                   Q (Mr. McKinnon continuing) Since the trial have you re-  
10                  searched any information on these individuals? Have  
11                  you looked for any information on these individuals?

12                  A I have not done any research. I certainly have talked  
13                  with my assistant, Mr. Grubb, and Mr. Dinkins, who  
14                  assisted me prior to the striking of this jury, just  
15                  to verify that some things I've testified today were  
16                  things that I knew at the time of the trial.

17                  Q All right. Now, among the individuals that you did  
18                  not strike were there not some whose relatives you had  
19                  prosecuted?

20                  THE COURT: Now, Mr. McKinnon, does that ques-  
21                  tion -- is that -- does that mean the ones  
22                  that were left that served on the panel?

23                  MR. MCKINNON: (No response.)

24                  THE COURT: Now, you struck some that he might  
25                  have struck if you hadn't struck them. So,

1                   is your question limited to the ones that  
2                   actually served on the jury?

3                   MR. MCKINNON: It would be all of them including  
4                   some I struck, because some of them I struck  
5                   by the way, and some of them I struck after  
6                   determining that he was not going to strike  
7                   them.

8                   THE COURT: Now, you couldn't determine that, Mr.  
9                   McKinnon, until the jury was totally struck  
10                  could you?

11                  MR. MCKINNON: Right. As it gets closer to the  
12                  end you go back and get some if you feel the  
13                  other side might strike.

14                  THE COURT: Well, I understand about striking  
15                  juries, but I think you can ask Mr. LeMaistre  
16                  whatever questions you want to that are  
17                  reasonable, but if they weren't on the jury  
18                  he could have struck them. So, why don't you  
19                  limit your questions to the ones that served  
20                  on the jury, because you asked him to look at  
21                  some forty something names that he might or  
22                  might not remember.

23                  MR. MCKINNON: All right.

24                  Q The people that served on the jury, are there not some  
25                  with relatives who you prosecuted?

1 A I know of no relative of Robert Bradley that I have  
2 prosecuted; I know of no relative of Doyle T. Burress  
3 that I have prosecuted; I know of no relative of  
4 Christine Giannascoli that I have prosecuted; I know  
5 of no relative of Richard Hatfield that I have prose-  
6 cuted; I know of no relative of Glenda Jackson that I  
7 have prosecuted; I know of no relative of Michael  
8 Kornegay that I have prosecuted; know of no relative  
9 of James H. Lindsey that I have prosecuted; I know of  
10 no relative of Lewis R. Powers that I have prosecuted;  
11 I know of no relative of Ms. Joan C. Snell that I have  
12 prosecuted; or of Mr. Jimmy Sowell--I know of no re-  
13 lative of his I have prosecuted; I know of no relative  
14 of Charles C. Warr--I know of no relatives of his that  
15 I have prosecuted, or Ms. Jessie V. Williams. I know  
16 of no relatives of any of those people, and I believe  
17 that is the venire.

18 THE COURT: The jury.

19 MR. LeMAISTRE: Excuse me, the jury.

20 MR. McKINNON: All right.

21 MR. LeMAISTRE: And that is not to say I haven't,  
22 but that is my recollection looking at this  
23 list right now. Yes, sir. I know of no  
24 relatives of any of those people that I have  
25 prosecuted or have been convicted of a crime.

1 MR. McKINNON: Okay.

2 Q Do you know of any of those people who have been in  
3 support court?

4 A Mr. McKinnon, I do not attend support court on a regu-  
5 lar basis, but looking at this list I would say no,  
6 sir, I know of none that we have had in support court.

7 Q Okay. Do you know whether any of these people live in  
8 proximity of Chattahoochee Courts or in proximity of  
9 the Gammage Road area where Fredrick and his relatives  
10 used to live?

11 A I do not see any of these persons that live in close  
12 proximity or in -- or in close proximity to Chatta-  
13 hoochee Courts. I see that Mr. Burress does live on  
14 Gammage Road, but he does not live in what is known as  
15 Norcutt Manor which are the black projects, so to  
16 speak, up there. The row of black homes on the right  
17 as you proceed north up that road, and for that reason  
18 I did not believe he was in that neighborhood and would  
19 not be a friend of Ms. Rency Lynn or Alvester Lampley  
20 or this defendant, Fredrick Lynn.

21 Q Now, among the people that were left serving on the  
22 jury panel, were some young people and some unemployed  
23 people were there not?

24 A There were some young people. Let me look back at it.  
25 I don't see any unemployed people. I don't recollect

1 any of the people as being unemployed. Yes, there are  
2 some young people on that jury.

3 Q Okay. Now, with reference to Larry Farmer, as far as  
4 the part of the county in which he resides, isn't  
5 Route 2, Midway, in -- isn't that the Mt. Andrew area  
6 rather than the Comer area?

7 A Mr. McKinnon, I'm not sure about that -- about exactly  
8 where that route is I would like to say for the re-  
9 cord you very ably had this trial postponed one time  
10 several years ago because you noted that an area there  
11 at AOC, or whoever draws the venire, had excluded the  
12 Midway route, which didn't mean anything to me, and  
13 thus I feel that you are familiar with that area. You  
14 brought that very ably to the Court's attention, and  
15 Judge Jack Wallace, who was the presiding judge at  
16 that time, granted a continuance in order to have a  
17 proper cross-section of this area of the county brought  
18 so we could pick a proper jury. So, I did not try to  
19 endeavor as to whether -- to learn whether this fellow,  
20 Mr. Farmer, lived in close proximity to you or your  
21 family which still lives in the Comer area. I just  
22 knew it was an area that you obviously were familiar  
23 with, and I do not feel I was familiar with.

24 Q Okay. Now, awhile ago you indicated one of the reasons  
25

1 you struck an individual was because he lived in a  
2 high crime area. What areas of Eufaula would you de-  
3 fine as high crime areas?

4 A I would consider Chattahoochee Court a high crime area.  
5 I consider the area off of Dale Road known as Dudley  
6 Quarters as a high crime area. In Eufaula those would  
7 be the two high crime areas that first come to mind.

8 Q Are those both predominantly black neighborhoods?

9 A Yes, sir.

10 Q Is the area of town out on Gammage Road where Fredrick  
11 Lynn lived, is that a predominantly black area?

12 A The area where Fredrick Lynn was living at the time?

13 Q Right.

14 A Yes, sir, that is a predominantly black area. Now,  
15 just for classification, I don't think I would charac-  
16 terize all of Gammage Road as a black area. I know a  
17 lot of black and white people that live up there.

18 Q Okay. So, that particular subdivision --

19 A (Interposing) That particular subdivision to my know-  
20 ledge is totally black.

21 Q Okay. And the people that you struck from the Gammage  
22 Road area would have been people that lived in or  
23 near that particular subdivision?

24 A That was what I believed, and that is correct.

25 Q Okay. Now, at the -- at the time that you selected

1 the jury were you aware that Gary Jackson had any con-  
2 nection with Jim Jackson?

3 A No, sir, not with any degree of certainty. As I be-  
4 lieve I stated, when I was giving my reasons Gary  
5 Jackson came forward with some information that he be-  
6 lieved was important concerning what two prospective  
7 jurors may or may not have said concerning Fredrick  
8 Lynn's guilt or innocence, or what should be done to  
9 him if he was found guilty. I merely associated Gary  
10 Jackson was black, Jim Jackson was black, and that  
11 added to my reasons that I already -- as I stated in  
12 my explanation, that just added another reason that I  
13 would not be receptive to having him on the jury.

14 Q Okay. Now, in making the case against Fredrick Lynn,  
15 city policemen and investigators had a large role in  
16 making that case against him did they not?

17 A Yes, sir.

18 Q Okay. And did you feel that people that were connected  
19 with the city would be more likely to be influenced by  
20 my connection with the city at the time, and Mayor  
21 Graves' connection at the time, and that would be in  
22 the fact that the city had a lot to do with making the  
23 case?

24 A I wasn't sure. I think at the time you signed the  
25 checks, and I certainly don't mean any impropriety

1 toward any personnel that worked for the city at the  
2 time, but I thought a prudent move, in view of the fact  
3 that the Mayor and city clerk were participating in  
4 the defense of this defendant, to remove any possi-  
5 bility, that I should take them off, and I certainly  
6 feel like they are probably happy I took them off, be-  
7 cause this is the real world and I'm sure they would  
8 hate to face you and Mr. Graves, not that you would have  
9 done anything improper, but they would have had a hard  
10 time looking you in the face, you know, if they had  
11 decided the way this jury had decided. And for those  
12 reasons I chose to take them off.

13 Q Okay. Now, the connection of Rose -- the possible  
14 connection of Rose Wright to Peggy Wright would have  
15 been a very indirect relationship, would it not?

16 A I don't know. I didn't know then and I don't know  
17 now if they are related or not. I know they live  
18 close to one another and have the same last name.

19 Q Okay. So, possibly, they might be married to people  
20 that are married to each other and possibly not be re-  
21 lated at all?

22 A Correct.

23 Q Okay. Now, when you look at the high crime areas of  
24 Eufaula, as you defined it, that will encompass a  
25 rather significant percentage of the black population

1 of Eufaula would it not?

2 A I don't know what percentage of the population. As  
3 I've stated before, those two areas are predominantly  
4 black or, perhaps, solely black; but, I don't know what  
5 percentage of the black population of Eufaula or Bar-  
6 bour County lived in Dudley Quarters or Chattahoochee  
7 Courts.

8 Q Do you recall how you learned that Mary Alice Scott  
9 was a friend of Frazier Farrior?

10 A Mr. McKinnon, I believe that was brought out during  
11 voir dire of the prospective jurors. That is my  
12 recollection.

13 Q According to your notes who was?

14 A Excuse me, it was brought out that she was a friend of  
15 Frazier Farrior's wife who is not, I assume, is not --  
16 is not the defendant's mother but who is the lady that  
17 is married to the defendant's father, Frazier Farrior,  
18 and in addition to being her friend she is her co-  
19 worker. I don't -- my notes don't reflect, and I have  
20 not -- I just don't know if she is a friend of Frazier  
21 Farrior's or not. She is a friend of the lady that  
22 Frazier Farrior is now married to, and that was brought  
23 out in the questioning by me and you.

24 Q Okay. Of the jurors who actually served, according  
25 to your notes, who is the oldest one?

1 A Of the ones that served?

2 Q Right.

3 A Let me check. I believe it's going to be Ms. Jessie  
4 Vaughn Williams, but let me look so I'll be correct.  
5 According to the birthdates that are on the original  
6 venire list Ms. Jessie V. Williams would be the oldest.

7 Q Okay. And what -- according to your information how  
8 old was she?

9 A Sixty-nine.

10 Q Sixty-nine. You stated earlier that Rose M. Wright's  
11 possible relation to a city employee was one of the  
12 things that induced you to strike her; but, according  
13 to your information are there relatives of city em-  
14 ployees that actually served on the jury panel?

15 A There are relatives of --?

16 Q Of city employees?

17 A The only person I see -- No, sir, I don't see any.  
18 Now, Jimmy Sowell was a fireman for a period of time,  
19 but my notes show he was working at Lakeview Hospital  
20 at the time of this case. I'm not saying there are or  
21 - not, but I'm not aware of any relatives of these twelve  
22 individual employees of the City of Eufaula.

23 Q Even though I'm the one that actually struck her did  
24 you have Linda Benefield listed as one that you in-  
25 tended to strike?

1 THE COURT: Mr. LeMaistre, for the purposes of  
2 this hearing you may object to his questions.

3 MR. LEMAISTRE: I can object? Well, Judge, I do  
4 object.

5 THE COURT: Sustained.

6 MR. MCKINNON: Your Honor, I would admit that that  
7 one is relevant particularly because the  
8 whole concept leads to the thought processes,  
9 you know, whether the strike was racially  
10 motivated. And this is an individual whose  
11 paychecks I signed at the time--whose hus-  
12 band's checks I signed at the time. While  
13 Rose M. Wright is just a possible relative  
14 and neighbor of somebody --

15 THE COURT: (Interposing) Mr. McKinnon, let me  
16 submit to you that the directions to the  
17 Court from the Court of Criminal Appeals said  
18 that the district attorney -- for me to find  
19 out if he had a rational explanation. As  
20 far as striking. It doesn't require him to  
21 get on the stand and tell what his intention  
22 was whether he should strike every man,  
23 woman, or child on the jury, and I'm not  
24 going to let you ask him that, and I sustain  
25 his objection. Now, you continue on.

1 MR. MCKINNON: Your Honor, my effort on that was  
2 to show the same reasons would have been  
3 equally applicable, you know, to people  
4 who were not --

5 THE COURT: (Interposing) Well, I'm not going to  
6 let you ask him about his intentions as  
7 to whether he should strike anybody off  
8 the jury, Mr. McKinnon. And I'm not  
9 going to argue with you about it any  
10 more, or let you argue with me about it  
11 any more.

12 MR. MCKINNON: All right.

13 Q Mr. LeMaistre, when we had a hearing on this matter  
14 before Judge Wallace on the motion for a new trial,  
15 and we were discussing the Batton case before Judge  
16 Wallace, did you not make a statement to the effect  
17 that your records as to the reason for your jury  
18 strikes were very limited, and you did not know whether  
19 they could be reconstructed at that time?

20 A I don't recall any statement to that effect.

21 MR. MCKINNON: Excuse me, your Honor, could I con-  
22 fer with Mr. Lynn just a moment?

23 THE COURT: Yes, sir.

24 Q Mr. LeMaistre, awhile ago you testified as to the small  
25 size of the community and inevitable relationships and

1 cross-connections, as I understood it, that we have.  
2 Isn't it true that these near relationships would be  
3 such that there could also be a second reason to strike  
4 a person who is black other than just being black?

5 A I'm not really sure I understand the question, or what  
6 you are getting at.

7 It is a small community, and when you are  
8 from this community, as I am, I've lived here thirty-  
9 five years, and have been an elected official for eight  
10 years, I would say there could be other reasons to  
11 strike any person more than race. I think I know a  
12 great number of people in this community. I know al-  
13 most everyone that was on that panel that we struck  
14 from, and I think, certainly, race would not be the  
15 only motivating impetus to strike any person.

16 Q But, it was one of the emphases, one of the considera-  
17 tions?

18 A No, sir.

19 Q Right?

20 A No, sir.

21 Q So, when you made these strikes you completely dis-  
22 regarded the race of individuals struck; is that  
23 correct?

24 A Race didn't have an effect on who I struck.

25 If I might at this point, your Honor, just

1 for the record, and for this Court, and if we were to  
2 get a favorable ruling here for any future court, as  
3 I stated a couple of times previously, when you are  
4 from an area the size of Eufaula, and you have grown  
5 up here, and you come back, and you have been an  
6 elected official, which means you have to interact with  
7 a great number of people, black, white, young, and  
8 old, you are going to know these people, and you are  
9 going to know a lot about these people. You are going  
10 to be thrown civically with some people and then  
11 socially with some people. And people that are my  
12 close friends are people -- or friends of mine or ac-  
13 quaintances are people that I have a great deal of  
14 respect for, and are the kind of people I want on the  
15 jury. And those are the people that I would chose not  
16 to strike; but, they are not necessarily all white  
17 people, and they are certainly not all black people.  
18 Race is not the factor that determines who I strike.

19 I think it would be ludicrous for me to  
20 strike folks like Bobbie Bradley who I play golf with  
21 on occasion. It would be rediculous for me to strike  
22 Richard Hatfield who I went to high school with, and  
23 whose wife was at one time a secretary for an attorney  
24 here in town, and she is a year younger than me. These  
25 are people that I'm just not going to strike. It is

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1 not because they are white, it is because I know them,  
 2 and I respect their opinion, and I think they will do  
 3 the right thing, and they are the kind of people I  
 4 want serving on any jury. And there was no one struck  
 5 from this jury simply on the basis of race from my  
 6 standpoint, and that's from the State's standpoint.

7 Now, Mr. McKinnon, I know the courts don't  
 8 require you to explain your reasons but I submit to you  
 9 that I'm coming with clean hands and not just you, and  
 10 it's not an attack on you but I think the defense is  
 11 going to have to answer the question at some point  
 12 or we are going to have to change the way we strike  
 13 juries.

14 MR. MCKINNON: I'll answer this question at this  
 15 point if I may.

16 THE COURT: Well, we'll put you under oath in a  
 17 little while, Mr. McKinnon, if you want to.  
 18 You are not under oath now, so you are not  
 19 required to answer any questions.

20 MR. MCKINNON: Okay. That is all I have.

21 MR. LeMAISTRE: That is all, Judge. I think that  
 22 fairly well sums up the thing.

23 THE COURT: Mr. McKinnon, would you like to call  
 24 any witnesses or anything?

25 MR. MCKINNON: Since that particular issue was

1 raised I would like to go under oath just to  
 2 address that point very briefly.

3 THE COURT: Why don't you take the stand and let  
 4 the court reporter swear you in.

5 DONALD J. MCKINNON

6 defense counsel herein, after first having been duly sworn,  
 7 testified as follows:

8 MR. MCKINNON: Your Honor, when I selected jurors  
 9 by striking I deliberately avoided striking any blacks  
 10 because I anticipated that they would be struck anyhow.  
 11 There were a couple of individuals that I seriously  
 12 considered striking but they got removed -- a couple  
 13 of blacks that I seriously considered striking but they  
 14 were struck by the other side; but, I deliberately  
 15 avoided striking blacks because of what I had antici-  
 16 pated.

17 THE COURT: All right. For the record, Mr. Le-  
 18 Maistre mentioned in his testimony that he thought  
 19 Mayor Graves helped you select the jury. Is that  
 20 correct?

21 MR. MCKINNON: Not as far as names are concerned.  
 22 He gave me some guidelines as far as age, and back-  
 23 ground, and that sort of thing, but no specific names.

24 THE COURT: But, he did assist you in your pre-  
 25 preparation for this trial, and was seated right behind

1 counsel table, and you had several consultations with  
2 him during the trial did you not?

3 MR. MCKINNON: That's correct.

4 THE COURT: And he did help you strike a jury.  
5 Is that what you are saying?

6 MR. MCKINNON: He gave me advice on how to strike  
7 them, but no names were mentioned. He said to look  
8 for certain types of people.

9 THE COURT: Yes, sir. Thank you.

10 MR. MCKINNON: Yes, sir.

11 THE COURT: Anything further for the State?

12 MR. LEMAISTRE: No, sir.

13 THE COURT: Anything further for the defendant?

14 MR. MCKINNON: Your Honor, of course, it's a very  
15 peculiar type proceeding without saying any  
16 more, but I feel like when you have got  
17 twelve individuals that are on the panel -- I  
18 think we ended up with -- What was it? Eleven  
19 blacks? But, you know, whenever the -- when  
20 the district attorney, you know, uses all of  
21 his strikes to eliminate blacks, and we have  
22 got a variety of reasons, the --the neighbor-  
23 hood and that sort of thing --. And if you  
24 are dealing with four, and five, and six, you  
25 know, one could easily say that race truly

1 had no effect on it, but when it gets up to  
2 this level it begins to be more than coinci-  
3 dental. I'm not making any accusations of  
4 dishonesty, but I have got to look after a  
5 record for appeal; but, consciously or sub-  
6 consciously somehow race enters into it when  
7 you start considering these types of consider-  
8 ations, and they do lead to the elimination  
9 of all blacks. It is just hard to say that  
10 race has nothing to do with it. And that is,  
11 really, all I have to say.

12 THE COURT: All right, sir.

13 The Court finds that the State has met  
14 its burden after the Court granted the defend-  
15 ant his prima facie case without having to  
16 make -- to prove anything. The Court finds  
17 that the district attorney has more than  
18 amply explained his reasons for striking the  
19 persons that he did off the jury, and that  
20 those reasons show that the strikes were not  
21 racially motivated; so, this motion, as to  
22 what I assume is my direction from the Court  
23 to determine whether or not Mr. Lynn should  
24 be granted a new trial, based on these  
25 grounds, it is my determination he should not

1           be granted a new trial. And the finding of  
2           this Court will be reduced to writing and  
3           mailed to the Court of Criminal Appeals as  
4           directed.

5           Okay, we are finished.

6           MR. LeMAISTRE: Thank you, Judge.

7           MR. MCKINNON: Thank you.

8           (THEREUPON, court stood in adjournment)

9           \* \* \* \* \*

1           CERTIFICATE OF COMPLETION OF  
2           REPORTER'S TRANSCRIPT

3           STATE OF ALABAMA, ]  
4           PLAINTIFF,    ] TO: The Clerk of the Criminal  
5           - VS -       ] Court of Appeals  
6           FREDRICK LYNN, ] CRIMINAL ACTION NO. CC-  
7           DEFENDANT.    ]

8           I, ANDREW J. CLINGAN, JR., RPR, Official Court  
9           Reporter for the Third Judicial Circuit of Alabama, certify  
10          that I have this date completed and filed with the Clerk of  
11          the Trial Court the original and three copies of a true and  
12          correct transcript of the evidence and matters designated  
13          by the appellant. All pages are numbered serially, centered  
14          at the top, right-hand corner, prefaced by an index and  
15          ending with the number appearing at the top of this certi-  
16          ficate.

17          I certify that a copy of this certificate has  
18          this date been served on: The Clerk of the Criminal Court  
19          of Appeals, the Attorney General, and counsel for the de-  
20          fendant.

21          Dated this the 18th day of May, 1987.

22          *Andrew J. Clingan Jr.*  
23          Andrew J. Clingan, Jr., RPR

Supreme Court U.S.  
FILED  
OCT 2 1989  
JOSEPH F. SPANOL, JR.  
CLERK

ORIGINAL

NO. 89-5503 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

FREDERICK LYNN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

RECEIVED

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION  
TO CERTIORARI

DON SIEGELMAN  
ALABAMA ATTORNEY GENERAL

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7118

QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THE COURT GRANT CERTIORARI AS TO PETITIONER'S SIXTH AMENDMENT CLAIM WHERE NO SIXTH AMENDMENT ISSUE WAS RAISED IN OR DECIDED BY THE COURT BELOW?
- II. SHOULD THE COURT GRANT CERTIORARI AS TO PETITIONER'S FOURTEENTH AMENDMENT ISSUE WHERE IT IS PLAINLY NOT WORTHY OF CERTIORARI REVIEW?

PARTIES

The caption contains the names of all parties in the court below.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals affirming petitioner's conviction and death sentence reported as Lynn v. State, 543 So.2d 704 (Ala.Cr.App. 1987). The decision of the Supreme Court of Alabama affirming the decision of the Court of Criminal Appeals is reported as Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

JURISDICTION

The Court has no jurisdiction as to the Sixth Amendment issue raised in the petition because it was not raised in or decided by the Court below. The Court has jurisdiction as to the Fourteenth Amendment issue under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI  
(in pertinent part)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,....

United States Constitution, Amendment XIV  
(in pertinent part)

...[N]or shall any state...deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted in April 1983 by the Grand Jury of Barbour County, Alabama, for the capital offense of intentional killing during a nighttime burglary of an occupied dwelling under Code of Alabama 1975, § 13A-5-31(a)(4) (repealed). Petitioner was convicted and sentenced to death, but this conviction was reversed by the Supreme Court of Alabama. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985).

Petitioner was tried a second time, and again convicted and sentenced to death. On appeal the case was remanded by the Court of Criminal Appeals of Alabama, under the authority of Batson v. Kentucky, 476 U.S. 79 (1986), for a determination of whether there was a prima facie case of discrimination under Batson and, if so, to give the prosecutor an opportunity to give race-neutral reasons for his strikes. Lynn v. State, 543 So.2d 704 (Ala.Cr.App. 1987). The trial court subsequently found no discrimination. On return to remand the case was affirmed by the Court of Criminal Appeals. Id. The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama on December 30, 1988. Ex parte Lynn, 543 So.2d 709 (Ala. 1988). On July 14, 1989, the Supreme Court of Alabama overruled an application for rehearing.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI AS TO PETITIONER'S CLAIM BASED ON THE SIXTH AMENDMENT BECAUSE NO SIXTH AMENDMENT ISSUE WAS RAISED IN OR DECIDED BY THE COURT BELOW

Petitioner claims that the prosecutor's striking of certain black jurors violated his Sixth Amendment right to an impartial jury. The argument in the Supreme Court of Alabama, however, was based on Batson v. Kentucky, 476 U.S. 79 (1986), which pertains to the Fourteenth Amendment alone (see Appendix A, a copy of petitioner's brief in that court). The decision of the Supreme Court of Alabama addressed only arguments under Batson. Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

This Court has no jurisdiction as to issues neither raised in nor decided by the court below. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). For this reason the Court should deny the petition as to this Sixth Amendment issue.

II. THE COURT SHOULD DENY CERTIORARI AS TO PETITIONER'S CLAIM BASED ON THE FOURTEENTH AMENDMENT BECAUSE IT IS NOT WORTHY OF CERTIORARI

Petitioner asks the Court to grant certiorari and decide whether reasons given by the prosecutor for his strikes of certain black jurors were race-neutral. The actual claim, however, as presented by petitioner's own argument, is not that these reasons are facially insufficient, but that the record as a whole indicates discrimination. This issue presented is not worthy of certiorari review.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Court established a general procedure to be followed where a defendant believes he is the victim of racial discrimination in jury selection. The defendant must first make a prima facie showing of discrimination. 476 U.S. at 96-97. If this is done, the burden shifts to the prosecution to come forward with race-neutral reasons for its strikes of the veniremembers in

question. Id., at 97. The trial court then has the duty to determine, based on all relevant circumstances, whether there was purposeful discrimination. Id., at 98.

The trial in this case was held prior to Batson v. Kentucky, supra.

On appeal the Court of Criminal Appeals, noting that Batson was applicable to the case under Griffith v. Kentucky, 479 U.S. 314 (1987), remanded the case to the trial court for a determination of whether a prima facie case of discrimination had been established and, if so, to give the prosecutor an opportunity to come forward with race-neutral reasons for his strikes. Lynn v. State, 543 So.2d 704, 706 (Ala.Cr.App. 1987). A hearing was held, at which the prosecutor gave explanation for his strikes, and the trial court found no purposeful racial discrimination. This decision was affirmed by the Court of Criminal Appeals, and later by the Supreme Court of Alabama. Ex parte Lynn, 543 So.2d 709 (Ala. 1988).

The prosecutor's reasons were as follows:

At the hearing, the District Attorney testified, under oath, and the trial court allowed defense counsel to cross-examine the witness. The District Attorney's stated reasons for striking the eleven black persons from the jury venire are as follows: (1) The juror was the brother of a man the District Attorney had criminally prosecuted and convicted "on several occasions" and the brother of another man against whom the District Attorney's Office was "presently enforcing child support." (2) The juror's husband was related to the defendant's father. (3) The juror was twenty-five years old and "reputed to be connected with drugs." His father had a felony record and had been convicted of a drug related offense. The juror also lived in the same area of the county as did the lead defense counsel. (4) The juror lived in an area where the defendant was living at the time of the crime and where the defendant's aunt and grandmother had lived for "numerous years." (5) The juror was a co-employee of the father of Gary Marcus Strong, an accomplice and co-defendant and a key witness against the defendant. Strong had a "bad reputation" and had pleaded guilty "to a crime in connection with [the] crime" for which the defendant was being tried. If the juror knew of Strong, he might not believe his testimony. Additionally, a small community was involved and the juror's name was Jackson. The District Attorney had prosecuted and convicted eight people named Jackson in the past eight years. The District Attorney

suspected that the juror might be related to one of those convicts. (6) The juror was twenty-eight years old, unemployed, and lived closed to a city magistrate. The lead defense counsel was the city clerk and the mayor assisted defense counsel in striking the jury. (7) The juror lived one block from co-defendant Strong. The District Attorney "felt that anyone that knew [Strong] might doubt what he was telling even though he was under oath." The juror also lived in "a very high crime district" and might "not be as shocked or opposed to crime because of those things." (8) The juror was a neighbor of the defendant's grandmother and aunt and lived in close proximity to the defendant when the crime was committed. (9) The juror was a friend of, and worked with, the wife of the father of the defendant. (10) The eighty-year-old juror appeared "feeble and hard of hearing" and "somewhat weak on death qualifications." (11) The juror was twenty-three years old, had a child fathered by co-defendant's Strong's brother, and was related by marriage to a state investigator who would testify as a witness. The investigator felt she would not be favorable to the State's case.

543 So.2d at 708-709. These reasons are related to this case in that they either arise from the particular facts here or are consistent with the State's general striking philosophy in any criminal case. Petitioner presents no serious argument that these reasons are not race-neutral on their face. Rather, petitioner argues in the main that these reasons are unacceptable here because, allegedly, they are inconsistent with voir dire questioning and other striking by the prosecutor.

The issue thus presented by petitioner is not whether the reasons here were facially satisfactory under Batson, but instead whether based on the record as a whole the trial court was correct in finding no discrimination. The Court stated in Batson that because the trial court's findings on the ultimate issue of discrimination largely turn on questions of credibility, those findings are entitled to "great deference" on appeal. Id., at 98 n. 21.

The issue here is not worthy of certiorari review, for two reasons. First, any decision here would have little value as precedent. The issue is whether, based on all the circumstances reflected in the record, the trial court's decision was clearly erroneous. Any decision would be based on

the particular facts of this case and would have little general application. This Court is well aware of the relentless demands on its time to decide cases of far-reaching impact. This is simply not such a case.

The second reason certiorari review is inappropriate here stems from the standard of review mandated in Batson. As was stated above, the trial court's determination as to the existence of discrimination is to be given great deference on appeal. Petitioner has not shown that the trial court's decision was clearly erroneous. Moreover, a review of that decision, based as it would be on the record as a whole, would best be undertaken by a lower court, as it undoubtedly will be in this death-penalty case.

Petitioner repeatedly argues that the trial court's decision was contrary to various aspects of Ex parte Branch, 526 So.2d 609 (Ala. 1987). In Batson the Court left to the lower courts the task of developing procedures for implementing the holding there, 476 U.S. at 99 n.24, and the Supreme Court of Alabama undertook that responsibility in Branch. This Court, however, has neither approved nor disapproved the various guidelines set forth in Branch. Petitioner's complain before this Court that Branch has been violated is therefore beside the point. Moreover, the Supreme Court of Alabama, surely the highest authority on the dictates of Branch, found no violation of Branch. 543 So.2d 709.<sup>1</sup>

The issue presented in this case is not worthy of certiorari review. For this reason the Court should deny certiorari.

<sup>1</sup>Petitioner's reliance on Houston v. Alabama, 108 S.Ct. 1724 (1988), is also misplaced. In Houston the State of Alabama moved that the case be remanded to the Court of Criminal Appeals of Alabama for consideration under the newly announced guidelines of Branch. The Court granted certiorari, vacated the judgment, and remanded the case to the Court of Criminal Appeals in light of the State's motion. Houston thus does not stand for anything.

CONCLUSION

For the above reasons the petition for writ of certiorari  
should be denied.

Respectfully submitted,

DON SIEGELMAN  
ALABAMA ATTORNEY GENERAL  
BY-

*William Duncan Little III*  
WILLIAM DUNCAN LITTLE III  
ALABAMA ASSISTANT ATTORNEY  
GENERAL  
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, William Duncan Little III, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 2nd day of October, 1989, I did serve a copy of the foregoing brief and argument on the attorney for petitioner by placing said copy in the United States Postal Service, first class postage prepaid, and properly addressed as follows:

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1047v



IN THE ALABAMA SUPREME COURT

FREDERICK LYNN,

APPELLANT

VS.

STATE OF ALABAMA,

APPELLEE

Appeal from the Circuit Court  
of Barbour County, Alabama

SC No. 86-1474

BRIEF AND ARGUMENT OF APPELLANT  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA COURT OF CRIMINAL APPEALS  
IN 4th DIV., NO. 698

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ORAL ARGUMENT REQUESTED

APPENDIX A

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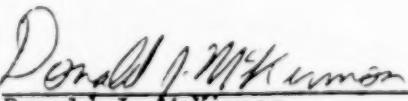
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REQUEST FOR ORAL ARGUMENT

Defendant, Frederick Lynn, request oral argument of this appeal for the following reasons:

1. This is a death penalty case.
2. This case involves important questions concerning what constitutes corroboration of the testimony of an accomplice.
3. This case involves important questions concerning the constitutionality of the Alabama death penalty statute.
4. This case involves numerous questions concerning the interpretation of various portions of the Alabama death penalty statute.
5. This case involves an important constitutional question involving the use peremptory strikes to exclude blacks from jury.



Donald J. McKinnon  
Attorney for Appellant, Frederick Lynn

|                                                                                                        |                  |
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STATEMENT OF THE CASE

On March 21, 1983, Sgt. A. G. Tew, an Investigator for the Alabama Bureau of Investigation, filed petitions in the Juvenile Court of Barbour County, Alabama, alleging that Frederick Lynn, a sixteen-year-old child, was delinquent. (1c, 2c and 3c of record in 4 Div. 161). In Case Number JU-83-0166, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did knowingly and unlawfully enter or remain unlawfully in a dwelling of Marie Driggers Smith with intent to commit a crime therein, to wit: Theft of property, and while effecting entry or while in the dwelling or in immediate flight therefrom, said defendant was armed with an explosive or deadly weapon, to-wit: a shotgun, in violation of Section 13A-7-5 of the 1975 Code of Alabama, as amended." (1c of record in 4 Div. 161). In Case Number JU-83-0167, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did, in the course of committing a theft of five old coins, one ring and one watch, the property of Marie Driggers Smith, use force against the person of Marie Driggers Smith, with intent to overcome her physical resistance of physical power of resistance, while the said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, in violation of Section 13A-8-41 of the 1975 Code of Alabama, as amended." (2c of record in 4 Div. 161). In case Number JU-83-0168, Tew alleged as follows: "The said child is delinquent in that on or about February 5, 1981, Frederick Lynn did, in the nighttime, with intent to commit a felony, to-wit: burglary, first degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: that certain house

located at 539 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said

Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary, Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31 (a) (4) of the 1975 Code of Alabama, as amended." (3c of record in 4 Div. 161).

Also on March 21, 1983, Honorable Sam A. LeMaistre, Jr., District Attorney, filed Motion to Transfer the cases to Circuit Court for the defendant to be tried as an adult. (9c of record in 4 Div. 161). On March 28, 1983, the Juvenile Court of Barbour County, Alabama, issued an order certifying the defendant to stand trial as an adult in all three cases. (10c of record in 4 Div. 161).

On March 31, 1983, the defendant, Frederick Lynn, gave notice of appeal of the certification to the Circuit Court of Barbour County. (16c of record in 4 Div. 161). On April 8, 1983, Honorable Jack W. Wallace, Circuit Judge of Barbour County, Alabama, issued an order certifying Frederick Lynn to stand trial as an adult in all three cases. (22c of record in 4 Div. 161). On April 18, 1983, Frederick Lynn gave notice of appeal of the certification order to the Alabama Court of Criminal Appeals. (24c of record in 4 Div. 161). Frederick Lynn's certification to stand trial as an adult was affirmed by the Alabama Court of Criminal Appeals without opinion. (4 Div. 161).

On April 25, 1983, an indictment was returned by the Grand Jury of Barbour County, Alabama, charging Appellant, Frederick Lynn, as follows (1C-2C in record in 4 Div. 183):

"The Grand Jury of said County charge that, before the finding of this indictment, and after January 1, 1980, Frederick Lynn, whose name is to the Grand Jury otherwise unknown, did, in the nighttime, with intent to commit a felony, to-wit: Burglary, First Degree, knowingly and unlawfully, break into and enter an inhabited dwelling, to-wit: That certain house located at 539 South Randolph Street, Eufaula, Alabama, which was occupied by Marie Driggers Smith, a person lodged therein and while effecting entry or while in the inhabited dwelling or in immediate flight therefrom, said Frederick Lynn was armed with a deadly weapon, to-wit: a shotgun, and during the course of said nighttime burglary Frederick Lynn did intentionally cause the death of another person, to-wit: Marie Driggers Smith, by shooting her with a shotgun, in violation of Section 13A-5-31 (a) (4) of the 1975 Code of Alabama, as amended, against the peace and dignity of the State of Alabama."

On May 2, 1983, Appellant, Frederick Lynn was arraigned. At arraignment, Appellant filed an application to be tried as a youthful offender. (7C-8C in record in 4 Div. 183). The application was denied. (8C in record in 4 Div. 183). At arraignment, Frederick Lynn pled "not guilty." The Appellant was tried on May 24 through May 27, 1983. (Caption Sheet, reporter's transcript in record in 4 Div. 183). On May 26, 1983, the jury returned a verdict of "guilty." (RT-369 and RT-372 in record in 4 Div. 183). On May 26, 1983, a sentence hearing was held before the jury. (RT-372 in record in 4 Div. 183). The jury fixed the punishment at death. (RT-404 in record in 4 Div. 183). On May 31, 1983, the Judge held his sentence hearing. (RT-407 in record in 4 Div. 183). The Judge also fixed the punishment as death. (RT-423 in record in 4 Div. 183). On June 30, 1983, Appellant filed alternative motions for judgment of acquittal, in arrest of judgment, or for a new trial. (100C in record in 4 Div. 183). On September 26, 1983, the alternative motions were denied by the Trial Court. (105C in record in 4 Div. 183).

On October 23, 1984, the Alabama Court of Criminal Appeals affirmed Appellant's conviction.

The Alabama Supreme Court granted certiorari; and on July 3, 1985, the Alabama Supreme Court reserved the conviction and remanded the case for a new trial.

The Appellant was retried on March 31 through April 4, 1986. (Caption Sheet, reporter's transcript). On April 4, 1986, the jury returned a verdict of "guilty". (RT-388). On April 4, 1986, a sentence hearing was held before the jury. (RT-390). The jury fixed the sentence at death. (RT-432). On April 9, 1986, the trial judge held a sentence hearing. (RT-434). The trial judge also fixed the sentence at death (RT-439 through 443).

On March 10, 1987, the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County for that Court to make a determination as to whether the prosecution's striking of all blacks on the venire was racially motivated. On May 13, 1987, the Circuit Court held a hearing to determine whether the prosecution's strikes were racially motivated and afterwards ruled that the strikes were not racially motivated. On June 9, 1987, on return to remand, the Court of Criminal Appeals affirmed Lynn's conviction. On July 28, 1987, Lynn's Application for Re-hearing was overruled by the Alabama Court of Criminal Appeals.

#### STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. DID THE TRIAL COURT ERR IN FINDING THAT THE PROSECUTION'S STRIKES WERE NOT RACIALLY MOTIVATED?  
BATSON vs. KENTUCKY, 106 S. Ct. 1712 (1986)  
BLACK v. CURB, 464 F. 2d 165 (1972)
- II. DID THE TRIAL COURT ERR IN REFUSING TO PERMIT APPELLANT'S ATTORNEY TO QUESTION DISTRICT ATTORNEY CONCERNING VENIREMEN NOT STRUCK BY THE DISTRICT ATTORNEY?  
BATSON v. KENTUCKY, 106 S. Ct. 1712 (1986)
- III. DID THE TRIAL COURT ERR IN FAILING TO ORDER THAT THE PROSECUTION NOT USE ITS PEREMPTORY STRIKES IN A MANNER TO EXCLUDE ALL BLACK PERSONS FROM JURY DUTY?  
BATSON v. KENTUCKY, 106 S. Ct. 1712 (1986).  
SWAIN v. ALABAMA, 380 U.S. 202 (1965).
- IV. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN CHALLENGE FOR CAUSE OF INDIVIDUAL WHO WAS SUPERVISOR OF LAW ENFORCEMENT OFFICERS AT TIME SUCH OFFICERS WERE INVESTIGATING THIS CASE?  
BROWN v. STATE, 37 Ala. App. 516, 74 So. 2d 273, aff'd.  
261 Ala. 696, 74 So. 2d 277 (1954).  
MCADORY v. STATE, 37 Ala. App. 349, 68 So. 2d 68 (1953).  
WELCH v. CITY OF BIRMINGHAM, 389 So. 2d 521 (Ala. Cr. App. 1980).

VIII. WAS LYNN CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

- V. DID THE TRIAL COURT ERR IN PERMITTING PROSECUTION WITNESS TO GIVE OPINION THAT VICTIM'S HOUSE HAD BEEN "RANSACKED"?
- CENTRAL OF GEORGIA RY. CO. v. ROBERTSON, 206 Ala. 578, 91 So. 470 (1922).
- DOUGLASS v. CENTRAL OF GEORGIA RY. CO., 201 Ala. 395, 78 So. 457 (1918).
- MCELROY'S ALABAMA EVIDENCE, 3ed, § 128.09.
- SOVEREIGN CAMP OF WOODMAN OF THE WORLD v. WARD, 196 Ala. 327, 71 So. 404 (1916)
- STANDARD COOPERAGE CO. v. DEARMAN, 204 Ala. 553, 86 So. 537 (1920)
- VI. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "PRIOR TO SEEING THEM (INVESTIGATORS) DID YOU KNOW THEY WERE COMING?"
- BILL STEBER CHEVROLET-OLDSMOBILE, INC., v. MORGAN, 429 So. 2d 1013 (1983).
- LOVEMAN, JOSEPH, 7 LOEB v. MCQUEEN, 203 Ala. 280, 82 So. 530 (1919)
- STOKLEY v. STATE, 254 Ala. 534, 49 So. 2d 284 (1951).
- TRAMMELL v. DISCIPLINARY BD. OF THE ALABAMA STATE BAR, 431 So. 2d 1168 (Ala. 1983).
- VII. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "DO YOU KNOW SHE WAS KILLED ON FEBRUARY 5th OF THAT YEAR?"
- CODE OF ALABAMA, 1975, § 12-21-138.
- OAKLEY v. STATE, 135 Ala. 29, 33 So. 693 (1903).

- ANDERSON v. STATE, 44 Ala. App. 388, 210 So. 2d 436 (1968).
- CALDWELL v. STATE, 418 So. 2d 168 (Ala. Cr. App. 1981), cert. quashed Aug. 27, 1982
- DEERMAN v. STATE, 486 So. 2d 515 (Ala. Cr. App. 1986)
- HARRIS v. STATE, 420 So. 2d 812 (Ala. Cr. App. 1982).
- KELLER v. STATE, 380 So. 2d 926 (Ala. Cr. App. ).
- KIMMONS v. STATE, 343 So. 2d 592 (Ala. Cr. App. 1977).
- LADD v. STATE, 39 Ala. App. 172, 98 So. 2d 56
- LEONARD v. STATE, 459 So. 2d 970 (Ala. Cr. App. 1984)
- LINDHORST v. STATE, 346 So. 2d 11 (Ala. Cr. App. 1977)
- MCCOY v. STATE, 397 So. 2d 577 (Ala. Cr. App. 1981)
- MILLS v. STATE, 408 So. 2d 187 (Ala. Cr. App. 1981)
- PEACOCK v. STATE, 369 So. 2d 61 (Ala. Cr. App. 1979)
- SORRELL v. STATE, 249 Ala. 292, 31 So. 2d 82 (1947).
- THOMPSON v. STATE, 374 So. 2d 388 (Ala. 1979).
- WOODS v. STATE, 387 So. 2d 313 (Ala. Cr. App. 1979)

IX. SHOULD THE TRIAL HAVE DECLARED A MISTRIAL AFTER DISTRICT ATTORNEY STATED IN ARGUMENT THAT HE BELIEVED WITNESS?  
ADAMS v. STATE, 280 Ala. 678, 198 So. 2d 255 (1967).

BLUE v. STATE, 246 Ala. 73, 19 So. 2d 11.

BROWN v. STATE, 393 So. 2d 513 (Ala. Cr. App. 1981)

DUBOSE v. STATE, 148 Ala. 560, 42 So. 862.

HALL v. U. S., 419 F. 2d 582 (5 Cir. 1969).

JETTON v. STATE, 435 So. 2d 167 (Ala. Cr. App. 1983)

KNIGHTEN v. STATE, 35 Ala. App. 524, 49 So. 2d 789 (1951)

MCGHEE v. STATE, 274 Ala. 373, 149 So. 2d 5 (1963)

TARVER v. STATE, 492 So. 2d 328 (Ala. Cr. App. 1986).

WALDROP v. STATE, 424 So. 2d 1345 (Ala. Cr. App. 1982).

WEATHERSPOON v. STATE, 34 Ala. App. 450, 40 So. 2d 910 (1949)

X. WAS IT ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A RANDOM DRAW DOWN OF THE QUALIFIED JURY PANEL IMMEDIATELY PRIOR TO THE MAKING OF PEREMPTORY STRIKES?

CODE OF ALABAMA, 1975, Sec. 12-16-100.

XI. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE THE BARREL FROM A SAWED-OFF SHOTGUN FOUND AT THE HOME OF APPELLANT'S GRANDMOTHER?

ANDERSON v. STATE, 362 So. 2d 1296 (Ala. Cr. App. 1978)

CUNNINGHAM v. STATE, 22 Ala. App. 583, 118 So. 242.

HUMPHREY v. STATE, 370 So. 2d 344 (Ala. Cr. App. 1979)

MCGUFFIN v. STATE, 178 Ala. 40, 59 So. 635 (1912).

MEANS v. STATE, 51 Ala. App. 8, 282 So. 2d 356.

RUSSELL v. STATE, 54 Ala. App. 452, 309 So. 2d 489 (1974).

TAYLOR v. STATE, 442 So. 2d 128 (Ala. Cr. App. 1983)

WASHINGTON v. STATE, 56 Ala. App. 555, 323 So. 2d 738 (1975).

WILLIAMS v. STATE, 384 So. 2d 1205, (Ala. Cr. App. 1980).

XII. IS THE ALABAMA DEATH PENALTY STATUTE UNCONSTITUTIONAL AS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND OF ALABAMA?

XIII. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION THAT THE APPELLANT RECEIVE TWO STRIKES FOR EACH ONE STRIKE FOR THE STATE IN JURY SELECTION?

CODE OF ALABAMA 1975, Sec. 12-16-100.

U. S. CODE, Title 42.

XIV. WHEN COMPARED WITH SIMILAR CASES, THE DEATH PENALTY IS INAPPROPRIATE IN THIS CASE.

BUSH v. STATE, 431 So. 2d 555 (Ala. Cr. App. 1982)

CLISBY v. STATE, 456 So. 2d 86 (Ala. Cr. App. 1982)

EVANS v. STATE, 361 So. 2d 654 (Ala. Cr. App. 1977).

EX PARTE BELL, 475 So. 2d 609 (Ala. 1985).

EX PARTE FLOYD, 486 So. 2d 1321 (Ala. 1986).

EX PARTE HARRELL, 470 So. 2d 1309 (Ala. 1985)

EX PARTE JEFFERSON, 473 So. 2d 1110 (Ala. 1985).

EX PARTE JONES, 456 So. 2d 380 (Ala. 1984).

EX PARTE KENNEDY, 472 So. 2d 1106 (Ala. 1985).

EX PARTE THOMAS, 460 So. 2d 216 (Ala. 1985).

LINDSEY v. STATE, 456 So. 2d 383 (Ala. Cr. App. 1983).

LYNN v. STATE, 477 So. 2d 1365 (Ala. Cr. App. 1984).

RITTER v. STATE, 475 So. 2d 266 (Ala. Cr. App. 1978).

EX PARTE DUREN, 507 So. 2d (Ala. 1987).

EX PARTE GRAYSON, 479 So. 2d 76 (Ala. 1984).

EX PARTE HUBBARD, 500 So. 2d 1231 (Ala. 1986).

EX PARTE TARVER, 500 So. 2d 1256 (Ala. 1986).

EX PARTE THOMPSON, 503 So. 2d 887 (Ala. 1987).

EX PARTE WATKINS, 509 So. 2d 1065 (Ala. 1984).

SUMMARY OF TRIAL COURT RULINGS AND  
ACTIONS ADVERSE TO APPELLANT

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9C, RT-11,

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26C, RT-5

27C, RT-5, RT-6, RT-24

28C, RT-7

40C, RT-22,

42C, RT-23,

43C, RT-313, RT-314

67-C, RT-320

68-C, RT-320

SUMMARY

Motion in Limine denied, related to Defendant's possession of guns at other times.

Motion for case to be tried as non-Capital case denied.

Motion for reduction of jury panel denied.

Portion of discovery motion denied.

Denial of Motion to enjoin Prosecutor from utilizing his Peremptory challenges to exclude blacks from jury panel.

Denial of Motion for additional Peremptory challenges..

Denial of Motion to prohibit state from using it's Peremptory strikes to exclude Negroes from jury.

Denial of Motion to prohibit death qualification of prospective jurors or for separate jury for Guilt and Punishment Phase.

Denial of Motion for separate juries for Trial and Penalty Phases.

Denial of Motion for psychiatric evaluation.

Denial of Motion for individual Voir dire.

Denial of Motion for continuance.

Denial of Motion for change of verdict.

Denial of Motion to exclude State's evidence.

Refusal of proposed charge #22.

Refusal of proposed charge #23.

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70-C, RT-320

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87-C, RT-430, RT-431

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117-C

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RT-69

RT-113, RT-114

RT-132

RT-138

RT-146

RT-147

RT-157, RT-158

RT-158

RT-190, 191, 212, 213

SUMMARY

Refusal of proposed charge #25.

Refusal of proposed charge #26.

Refusal of proposed charge #3 (Sentence phase).

Refusal of proposed charge #14 (Sentence phase).

Refusal of proposed charge #15 (Sentence phase).

Refusal of proposed charge #16 (Sentence phase).

Denial of post-trial Motion.

Denial of Motion based on Batson vs. Kentucky.

Denial of challenge for cause of prospective juror Bradshaw.

Denial of challenge for cause of prospective juror Gissandaner.

Excusal of prospective juror Mahone.

Denial of challenge for cause of prospective juror Little.

Denial of challenge for cause of prospective juror Sowardi.

Sustaining of state's objection to suggestion of parole possibility for co-Defendant who testified for State.

Overruling objection to Gory Photograph (ex. #3).

Overruling objection to witness characterization of house as "ransacked".

Overruling objection to Gory Photograph (Ex. #4).

Overruling objection to question.

Overruling objection to question.

Overruling objection to gun barrel's admission.

Record Page No.

RT-195                    Sustained objection to defense question. (Witness in trouble).  
RT-195                    Sustained objection to defense question. (Other criminal activities).  
RT-196                    Sustained objection to defense question.  
RT-203                    Sustained objection to defense question.  
RT-240                    Sustained objection to defense question.  
RT-277                    Overruled objection to question.  
RT-278                    Overruled objection to question.  
RT-292                    Overruled objection to leading question.  
RT-308                    Overruled objection to Gory Photograph. (Ex. #28).  
RT-309                    Overruled objection to Gory Photograph. (Ex. #29).  
RT-310                    Overruled objection to Gory Photograph. (Ex. #30).  
RT-318, RT-319           Denial of Motion for directed verdict of Acquittal.  
RT-340                    Sustained objection to defense argument.  
RT-353, 354, 355        Denied Motion for mistrial.

(These are rulings made after remand and the references are to supplemental record)

RECORD PAGE NO. ON REMAND

R-15 & 16                The Trial Court refused to allow the Appellant to cross-examine the District Attorney concerning individuals not struck by the District Attorney.  
R-24 & 25                The Trial Court refused to allow the Appellant to cross-examine the District Attorney concerning individuals not struck by the District Attorney.  
R-32 & 33                The Trial Court ruled that the State met its burden of proving that its strikes were not racially motivated.

SUMMARY

STATEMENT OF FACTS

The defendant did not testify and did not submit testimony relating to the time of the offense. The following statement of facts (97-C through 104-C) is taken from the Trial Court's finding of facts (without admitting the correctness of name):

"On February 6, 1981, the body of Marie Driggers Smith, an elderly widow, was found in her home located at 539 South Randolph Avenue in the City of Eufaula, Barbour County, Alabama. The first law enforcement officer to arrive on the scene, Captain Ted Dotson with the Eufaula Police Department, determined that Mrs. Smith was dead and that because of the excessive amount of blood on her body and near her body and because of the ransacked condition of the house, he suspected foul play was involved. Law enforcement officers from the Alabama Bureau of Investigation and the State of Alabama Department of Forensic Sciences and the Barbour County District Attorney's Office were called to aid in the investigation of this crime. Drawers had been pulled out and the contents thereof strewn throughout the house. Attempts were made to lift fingerprints from all of these items."

"An autopsy was conducted on the body of the victim and the results revealed that the victim was killed by a shotgun wound to the face. Additional findings showed that the victim had superficial incise wounds at the left wrist and right hand. Examination of the portions of the shell that was found in the body of the victim revealed that the victim had been shot with a twenty gauge shot shell slug."

"Gary Marcus Strong, an admitted accomplice to this crime, took the stand and testified for the State. Prior to testifying, Strong had pled guilty to Burglary

in the First Degree in connection with this crime and had been sentenced to thirty years in the penitentiary. Strong related that in September of 1982 he learned that he was wanted for questioning and that he turned himself into the Eufaula Police Department shortly thereafter. His fingerprints had been found inside the victim's home and he gave a confession to his participation in this crime and implicated the Defendant, Fredrick Lynn, as the trigger man. Strong testified that on Thursday, February 5, 1981, the Defendant came to his house in Chattahoochee Courts, a housing project for low-income families, is located approximately two blocks from the victim's residence. He testified further that he and the Defendant left his home shortly after 6:00 p.m. and went to Hardee's to eat. After eating, Strong and Lynn went to Laurie Daniels' house, located in Chattahoochee Courts, where Terry Green was visiting. Strong testified that Lynn had told him that he had put a sawed-off shotgun in Terry Green's car and wanted to pick it up and take it somewhere to sell it. Strong accompanied Lynn to the Daniels' residence and there Lynn took the sawed-off shotgun out of the trunk of Terry Green's car. Strong testified the gun was sawed-off at both ends and had tape around the stock. He testified that they left Chattahoochee Courts walking down South Randolph Avenue in the direction of town and toward the victim's house. As they passed in front of the victim's house it was noted that a light in the front room went off and Fredrick Lynn told Strong, "Let's stop here and check this out." Strong then testified that a few moments later Fredrick Lynn took the screen off a window in the front portion of the house and raised the window and entered the house. At this time, Lynn told Strong to meet him at the back door. Strong proceeded to the back door and a few moments later Lynn opened it and told him to come inside. Strong testified that at this time Lynn had the sawed-off shotgun held on the victim. Strong testified further that Lynn ordered the victim

that if she tried to escape again that he would kill her. Strong further testified that shortly after this he thought he heard a car or saw the headlights of a car outside the house and went to the back door to look. He didn't see anything and when he came back into the middle portion of the house Lynn told him to go in the next room and turn the television up very loud. Strong testified that he did so and after he had turned the volume up on the television he heard a gun shot and ran out of the house. He testified that as he ran out the back door he looked into the room where the Defendant and victim were and the Defendant was standing over the victim with the shotgun pointed at her. Strong testified that he ran home and hid the items that he had taken during the crime, these items included a wristwatch, a ring and some old coins. After doing this, Strong proceeded to a nightclub called the Casino Club where he met Fredrick Lynn and they joined Terry Green and Herbert Bouyer. At about closing time, 1:30 a.m., Strong testified that he, Lynn, Bouyer, and Green left the club together. He testified that he was taken to his house first and that he got out to go home for the night. The Defendant also got out at this point and went behind Strong's house and returned to Green's car with a sawed-off shotgun in his hand."

"Investigator Earlie Dinkins of the Eufaula Police Department testified that he conducted a consent search of the residence of Mrs. Rencie Lynn on the Gammage Road, Eufaula, Alabama, on March 4, 1981. Mrs. Rencie Lynn is the grandmother of Fredrick Lynn and evidence showed that Fredrick Lynn was living with her at this address on March 4, 1981. During the search a sawed-off barrel from a twenty gauge shotgun was obtained from a trash can in the carport area of the house and a twelve gauge shotgun that had been sawed-off at both ends was also found."

"Terry Green testified that on February 5, 1981, he was a Senior at Eufaula High School and attended school that day. He testified that he received a message

to pick up Fredrick Lynn at his grandmother's house after school and that he did so. The evidence revealed that Fredrick Lynn had a blue sweater with something wrapped in it when he came out of his house on February 5th, and got into Terry Green's car. The Defendant got Green's keys and put the sweater and what was subsequently revealed to be the sawed-off shotgun in the trunk of the car. Green described the gun as being sawed-off on both ends and as having tape around the butt of the gun. Green testified that later in the day he and the Defendant went to the playground area of Chattahoochee Courts where the Defendant got Green's keys, opened the trunk and got out the sawed-off shotgun and was showing it off to the people present at the playground. He also showed the people there that he had ammunition for the gun in his possession. Green testified that they stayed at the playground for approximately an hour and that he then went to visit his girlfriend, Laurie Daniels, at her residence. Before leaving the playground, Lynn wrapped the gun back in the sweater and placed it back in the trunk of Green's car. Green testified that later that evening, at approximately 8:00 p.m., Lynn came to Ms. Daniels' residence and got his car keys and went to the trunk. He testified that when Lynn brought the keys back to him after going to the trunk the Defendant was wearing the blue sweater in which the shotgun had been wrapped earlier. Green further testified that at approximately 11:00 p.m. he left Ms. Daniels' residence. Before leaving, Green went to his trunk to get out a water bottle as he had leaking radiator, and when he opened the trunk noted that the shotgun was not in the trunk. He testified that he went from Ms. Daniels' residence to Hardee's where he picked up Herbert Bouyer and from there they proceeded to the Casino Club. He testified that when he and Herbert Bouyer got to the Casino Club, Gary Strong and Fredrick Lynn were already there and that Lynn and Strong came over to where they were sitting and joined them at their table. Evidence

- revealed that the four left the Casino Club as it closed at approximately 1:30 a.m. and proceeded to Gary Strong's house. Green testified that Strong got out to go home at this time and that Lynn got out also and told Terry Green to wait for him as he had to go get something. He testified that he did not see where Lynn went or what he had with him when he came back. From there evidence showed that Green next took Bouyer to his car which was at Hardee's. From there Green and the Defendant went to the Omelet Shoppe and had something to eat and then proceeded to Gammage Road to take the Defendant home. As the Defendant got out of the car at his residence at Gammage Road, he reached under the seat of the car and pulled out the sawed-off shotgun and took it inside with him."

"Herbert Bouyer, who is currently in the Air Force and stationed in England, testified that on February 6th, he went to Fredrick Lynn's residence to visit Mrs. Rencie Lynn and Fredrick. He testified that he had a conversation with Fredrick Lynn on this date at approximately 10:00 a.m. and that the subject of the conversation was a sawed-off shotgun, which Lynn showed to Bouyer that day. Bouyer described the gun as being sawed-off on both ends and having tape on the stock. Bouyer testified that Lynn asked him to "take him somewhere to dispose of the gun", and that he refused to do so."

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING  
THAT THE DISTRICT ATTORNEY'S STRIKES  
WERE NOT RACIALLY MOTIVATED.

Based on the decision of the United States Supreme Court in the case, Batson vs. Kentucky, 106 S. Ct. 1712 (1986), the Alabama Court of Criminal Appeals remanded the case to the Circuit Court of Barbour County, Alabama.

On remand, the District Attorney stated reasons for the use of each of his peremptory strikes on black veniremen. Some of the reasons were as follows: (1) Juror related to a criminal; (2) The juror lived in a particular area, (3) The juror was a co-worker of a witness or other participant in the trial; and (4) The juror knew one of the prosecution's witnesses and might not believe that witness because of his bad reputation. (R-5 through R-14 Supplemental record).

In a small county (population wise) like Barbour County, the types of reasons given could be applied to the vast majority of the population. Barbour County consists of two divisions, and the Eufaula Division of the County consists of only about 16,000 people with about 14,000 being in Eufaula itself. The Court refused to permit cross-examination of the District Attorney as to how similar factors might have applied to jurors that he did not strike; but it is submitted that the same types of reasons could have been applied to any member of the venire.

If there were only two or three blacks on the venire, it could easily be coincidence that all of them were eliminated by the prosecution. However, when all 11 blacks out of a qualified panel of 38 are eliminated, it simply cannot be coincidence, but is clearly racial discrimination supported by excuses. The test should be results oriented. Black v. Curb, 165 F.2d 165 (1972). Reasons for peremptory strikes are so vague and numerous that race-independent excuses can always be provided - one must look at the results. Otherwise, the holding of the U. S. Supreme Court in Batson vs. Kentucky, 106 S. Ct. 1712 (1986) can be reduced to pure sham.

ARGUMENT

II.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT'S ATTORNEY TO CROSS-EXAMINE THE DISTRICT ATTORNEY AS TO VENIREMEN NOT STRUCK BY DISTRICT ATTORNEY.

In order to judge the sincerity of the race-independent reasons given by the District Attorney for his strikes of blacks, it is essential that the District Attorney be extensively examined concerning whether similar reasons might not have been applicable to white jurors who were not struck by the District Attorney. This line of examination was cut off completely by the Trial Court. (R-15, R-16, R-24, R-25, & R-26). By cutting off this line of questioning, the Trial Court deprived itself of critical information needed to perform its "duty to determine if the Defendant has established purposeful discrimination." Batson vs. Kentucky, 106 S. Ct. 1712 (1986).

ARGUMENT

III.

THE TRIAL COURT ERRED IN FAILING TO ORDER THAT THE PROSECUTION NOT USE ITS PEREMPTORY STRIKES IN A MANNER TO EXCLUDE ALL BLACK PERSONS FROM JURY DUTY.

For many years, there was no restriction whatsoever on the prosecution's use of its peremptory strikes. Then the rule developed that a defendant could attack the prosecution's use of peremptory strikes to exclude jurors because of race only if there was a pattern of so using peremptory strikes. Swain v. Alabama, 380 U. S. 202 (1965). In Batson v. Kentucky, 106 S. Ct. 1712 (1986), the U. S. Supreme Court ruled that requiring proof of a pattern posed an unrealistic burden on defendants. The Court ruled that it was no longer necessary for a defendant to show a pattern. It is only necessary to show only that the prosecution excluded all blacks in the case at bar. At that point, the burden shifts to the prosecution to show justifications for the strikes other than race.

Based on the holding of the United States Supreme Court in the case, Griffith v. Kentucky, No. 85-5221 (Jan. 13, 1987), that Batson applied retroactively, the Alabama Court of Criminal Appeals ordered the case remanded to the Circuit Court of Barbour County for a hearing to determine whether the State's use of its strikes was racially motivated. The State provided superficial, vague justifications not subject to any real means of attack. The defendant was precluded from examining the District Attorney concerning whether the same justifications would not have been

ARGUMENT

IV.

equally applicable to blacks not struck.

This late justification of strikes, coming months after jury selection is just not sufficient to meet constitutional standards - especially in view of the fact that the defendant warned the Court that the State, unless enjoined, would get an all-white jury. Based on the past experience in serious cases, this prophecy required little insight.

If the Trial Court had granted defendant's motion and told the District Attorney that he must leave 2 or 3 blacks on the jury, there would be no problem in trying to analyze the District Attorney's conscious and subconscious motives in eliminating veniremen.

An even better solution would be to have some sort of proportional representation in counties with significant minorities - upon Motion of defendant. For example, if a county is one-third black, then he should be allowed to have four black jurors, if he wishes. The four could be selected from among all of the blacks qualified to sit on the case, while the other eight could be selected from the balance of the qualified veniremen. Each attorney could keep his reasons for striking jurors secret, and noone would be put in the awkward position of attacking the honesty, integrity, or fairness of a prosecutor.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN CHALLENGE FOR CAUSE OF INDIVIDUAL WHO WAS SUPERVISOR OF LAW ENFORCEMENT OFFICERS AT TIME SUCH OFFICERS WERE INVESTIGATING THIS CASE.

In the course of qualifying jurors, prospective juror Little disclosed that, at the time of the alleged homicide, he was Mayor of the City of Eufaula and supervisor of police officers investigating the crime. (RT-68-69). Although Mayor Little denied that his former supervisory relationship over the witness would affect his ability to be fair, it is submitted that the existence of such a relationship itself establishes implied bias. McAdory v. State, 37 Ala. App. 349, 58 So. 2d 68 (1953); Brown v. State, 37 Ala. App. 516, 74 So. 2d 273, affd. 261 Ala. 696, 74 So. 2d 277 (1954).

Research discloses no case involving a challenge for cause under these exact circumstances. However, the case, Welch V. City of Birmingham, 389 So. 2d 521 (Ala. Cr. App. 1980), is quite instructive on the principles involved.

In Welch, the defendant was tried and convicted in city court of selling alcoholic beverages without a license. He was convicted and appealed for a trial de Nova before a circuit court jury. When the jury was being qualified, defendant challenged for cause an employee of the city's engineering department. The defendant was convicted; and his conviction was reversed by the Court of Criminal Appeals because of the Trial Court's failure to sustain the challenge for cause, based on the juror's employment.

In the present case, the City of Eufaula is not officially a party since the city cannot officially prosecute felonies. However, it is a "city case" in the sense that the investigation was commenced by city forces and two of the prosecution's key witnesses were city employees (at present and at the time of the offense). When the investigation was made, prospective juror Little was Mayor and supervised the City policemen who were participating in the investigation. Although the name "City of Eufaula" is missing from the caption, the City's interest in conviction is at least as strong as in the Welch case.

Moreover, in the Welch case, the prospective juror was in no way involved in enforcement of liquor laws; while, in the present case, the prospective juror had been mayor and, as such, supervised all aspects of city government, including law-enforcement.

It is therefore error for the trial court to have overruled the challenge for cause of Mayor Little. The error, of course, is not harmless. This error on the part of the trial court warrants reversal of Lynn's conviction..

V.  
THE TRIAL COURT ERRED IN PERMITTING PROSECUTION WITNESS TO GIVE OPINION THAT VICTIM'S HOUSE HAD BEEN "RANSACKED"

In direct examination, the District Attorney asked witness A.G. Tew (an investigator): "What condition did you find the rooms in that house to be?" Sgt. Tew responded: "They were ransacked." (RT-146).

Sgt. Tew's answer was not responsive to the District Attorney's question. According to Webster's New World Dictionary, "ransack" is a verb meaning "1. to search thoroughly; examine every part in searching. 2. to search through for plunder; pillage." Thus, instead of describing the scene, Mr. Tew gave his opinion of what happened at the scene prior to his arrival, i.e., someone had searched it thoroughly. His opinion as to the cause of the room's condition was clearly inadmissible. McElroy's Alabama Evidence, 3 ed, §128.09; Standard Cooperage Co. v. Dearman 204 Ala. 553, 86 So. 537 (1920); Central of Georgia Ry. Co. v. Robertson, 206 Ala. 578, 91 So. 470 (1922); Douglass v. Central of Georgia Ry. Co., 201 Ala. 395, 78 So. 457 (1918); and Sovereign Camp of Woodmen of the World v. Ward, 196 Ala. 327, 71 So. 404 (1916).

The objection was made immediately upon the illegal testimony. The objection was fully justified: "Mr. McKinnon; (Interposing) Your Honor, I object to the word "ransacked". It is a conclusion for the jury. It is a characterization of the activity that caused it (the mess)." (RT-146). The objection was overruled without explanation.

The Trial Court clearly erred in not sustaining the objective and giving a curative charge. The error cannot be regarded as harmless.

under the indictment (1-6) it was incumbent upon the State to prove a burglary as a part of the intentional killing incident. The plundering or ransacking would strongly support the State's position that there was a burglary. The witness' invasion of the province of the jury meant that the jury did not have to form its own conclusion from a detailed description of the scene; and this invasion effectively deprived the defendant of the right to a trial by jury on a key factual issue.

#### ARGUMENT

##### VI.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN OBJECTION TO FOLLOWING QUESTION TO PROSECUTION WITNESS: "PRIOR TO SEEING THEM(INVESTIGATORS) DID YOU KNOW THEY WERE COMING?"

It has been a fundamental principle in Alabama trial practice that a party may not attempt to bolster a witness' credibility until that witness' credibility is attacked. In the trial of the case at bar, this principle was violated repeatedly over the stated objections of defendant. The trial court permitted an investigator to describe in detail his efforts to locate a witness and to explain that the witness did not know that he was coming. (RT-157-158). The Trial Court allowed the District Attorney to ask a witness: "Prior to seeing them (investigators) did you know they were coming?" (The answer was "No." ) RT-278. Witness Green was given an opportunity to deny bias before his being accused of bias. RT-277.

The most flagrant example of improper bolstering of a witness' testimony was the District Attorney's question to Terry Green, "Did you know they were coming?" This bolstering of the witness' testimony violates a long-established principle of Alabama law. Trammell v. Disciplinary Bd. of the Alabama State Bar, 431 So. 2d 1168 (Ala. 1983); Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan, 429 So. 2d 1013 (1983); Stokley v. State, 254 Ala. 534, 49 So. 2d 284 (1951; and Loveman, Joseph, and Loeb v. McQueen, 203 Ala. 280, 82 So. 530 (1919). Since Terry Green, the witness being bolstered, was a key witness for the State, it cannot be said that the Trial Court's error was harmless.

ARGUMENT

VII.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN  
OBJECTION TO FOLLOWING QUESTION TO PROSECU-  
TION WITNESS: "DO YOU KNOW SHE WAS KILLED  
ON FEBRUARY 5th OF THAT YEAR?"

Perhaps the most elementary rule of trial practice is the one forbidding the leading of witnesses on direct examination. (Code of Alabama, 1975, § 12-21-138). It is reversible error for a trial court to abuse its discretion by allowing a highly prejudicial leading question. Oakley v. State, 135 Ala. 29, 33 So. 693 (1903).

ARGUMENT  
VIII.

LYNN WAS CONVICTED ON THE  
UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

The only direct evidence of Frederick Lynn's alleged involvement in the killing of Marie Driggers Smith was the testimony of Garrett Marcus Strong, an admitted accomplice. (RT-221-266). This testimony was supposedly corroborated by the testimony of witnesses, Terry Green and Herbert Bouyer and by the discovery of a sawed-off barrel at the home of Appellant by law-enforcement officers several weeks after the homicide. (RT-266-303 and 189-191).

The accomplice, Garret Marcus Strong, and the corroborator, Terry Green, proved to be quite flexible in conforming their testimonies to the needs of the prosecution, in spite of having previously made statements that were quite inconsistent with each other. In his statement dated September 23, 1982, Strong said that he had already left the house and was back in the yard when he heard a shot fired. (23E-25E). In his testimony, he said that he was still in the house when he heard the shot. (RT-234. In his statement, Strong said that after the shooting, he did not see Frederick Lynn until the next day. (23E-25E). In his testimony, he stated that he saw Frederick later that same night at the Casino Club. (RT-23S). In his statement, Strong stated that Appellant had taken the coins, ring, and watch from Mrs. Smith and that Appellant told Strong the next day about having those items. (23E-25E). In his testimony, on the other hand, Strong stated that he personally had taken those items and gave those items to Frederick Lynn the next day. (RT-237-238). There are numerous other inconsistencies between Strong's statement and his testimony, but these are the major ones.

When confronted with these and other inconsistencies on the witness stand, Strong said, "... me and my lawyer had straightened all that out." (RT-184, 187 in 4 Div. 183). At the last trial he again indicated his lawyer helped him straighten out his story. (RT-243). Of course, these changes were necessary to make Strong's statement correspond to that portion of Terry Green's statement in which Terry indicated that he later on the night of the homicide saw Frederick Lynn and Garrett Marcus Strong together at the Casino Club. (26E-29E).

Even the prosecution's great corroborator, Terry Green, gave a statement and testimony which were inconsistent with each other in many ways. In his statement, Terry Green was unable to pinpoint the time any better than "some-time during the first part of 1981." (26E-29E). In his testimony at the first trial, he narrowed it down to February 5, 1981. (Rt-239 in 4 Div. 183). At the first trial, he said that he was able to pin it down because he remembered all of the kids at school talking about the homicide the day after it happened.

(RT-252-253 in 4 Div. 183). School records show that he was not even at school on that day when all of the kids were supposedly talking about the murder. (RT-315-317). In his statement, Terry Green stated he left school between 1:00 and 2:00, while in his testimony at the first trial, he stated he left school at about twelve noon. (26E-29E, RT-61 from 4 Div. 183). In his testimony at the second trial, he narrowed it down to the day Mrs. Smith was killed. (RT-267). As with Strong, law enforcement people helped him get his statement straightened out. (RT-261 in 4 Div. 183). At the second trial, he said other witnesses helped him straighten his story out (RT-288). In his testimony at the first trial, Terry Green stated that, when he left the Casino Club, he left Garrett Marcus Strong and the Appellant, Frederick Lynn, standing outside the club; but, after additional conferring with law-enforcement officers, he decided he did not

leave them standing outside the club but instead gave them a ride home. (RT-274, 26-29E). In addition, at the time he gave his statement he did not "remember" going to Hardees and did not remember seeing Appellant, Frederick Lynn, get a sawed-off shotgun from under the front seat of the car (RT-272 in 4 Div. 183). During one part of his testimony, Terry Green might actually have been telling the truth, and that is when he said that he personally did not know a thing about what happened at the home of Marie Driggers Smith. (RT-273 in 4 Div. 183). In this case, we face a significant possibility of a miscarriage of justice. There is a strong possibility that Terry Green knew exactly what happened at the home of Marie Driggers Smith--because he might well have been there himself. Could Terry Green's great flexibility in his testimony have possibly resulted from the State's promise of immunity and \$10,000.00 in reward money? (35 and 36E). Clearly, reasonable doubt exists in this case as a matter of law.

The other great corroborator is Herbert Bouyer. Unfortunately, Appellant did not have a statement from Bouyer to compare with his testimony. Many of the changes made in the testimony of Strong and Green were obviously made to correspond with the testimony of Bouyer. There were two facets to Bouyer's testimony, one being his testimony that he, Terry Green, Garrett Marcus Strong, and Appellant, Frederick Lynn, all left the Casino Club together on the night of February 5, 1981. (RT-294). The other facet of Mr. Bouyer's testimony was that Appellant, Frederick Lynn, asked Bouyer on February 6, 1981, for help in getting rid of a gun. (RT-296-297). He was unable to provide any description of the gun other than its being sawed-off and having tape around the stock. He knew nothing about the gauge. (RT-296-297). In connection with Herbert Bouyer's testimony, there arose one of the strangest coincidences to occur during the

trial. The very same records which proved that Terry Green was absent from school on February 6, 1981, when he testified he heard everybody talking about the homicide, showed that Herbert Bouyer was present at school at the time he was supposedly talking with Appellant, Frederick Lynn, about getting rid of the gun. (R-315-217). Would that be that we had a statement from Bouyer to compare with his testimony!

**Appellant does not question the truthfulness of the only remaining corroborative testimony** which consists entirely of the fact that law-enforcement officers discovered gun parts at the residence of Frederick Lynn several weeks after the homicide. (RT-189-190). However, since those gun parts could not in any way be identified as being related to the weapon causing the death of Marie Driggers Smith, that evidence cannot be considered to be corroboration.

Naturally, if one believes the testimony of Garrett Marcus Strong (forgiving the inconsistencies), it would constitute evidence of Appellant's guilt, even though Strong denied having seen the fatal shot. (RT-233-234). Fortunately, however, the law requires that the testimony of an alleged accomplice be corroborated. Garrett Marcus Strong is just the kind of individual for which the corroboration statute was written. He got caught; he did not want to face the full, just consequences of his crime; and, in order to escape the full, just consequences of his crime, he put the finger on someone else.

If you try to ignore the gross inconsistencies in the State's corroborative testimony and interpret it in a manner most favorable to the State, you have the following matters that could be considered corroborative to a certain extent:

1. The Appellant, Frederick Lynn, was with the accomplice within two or three hours before the alleged homicide.
2. The Appellant was with the alleged accomplice two or three hours after the alleged homicide.
3. The Appellant was in possession of a sawed-off shotgun, unknown gauge, two or three hours before the alleged homicide.
4. The Appellant was in possession of a sawed-off shotgun, unknown gauge, within two or three hours after the alleged homicide.
5. On the day after the alleged homicide, Appellant requested the assistance of Herbert Bouyer in disposing of a sawed-off shotgun, gauge unknown.
6. About four weeks after the alleged homicide, a barrel from a 20-gauge shotgun was discovered at Appellant's residence, but no testing could certify that the barrel came from the particular gun with which Marie Driggers Smith was shot.

In connection with Frederick Lynn's having been seen with the alleged accomplice, Garrett Marcus Strong, before and after the alleged homicide, the first two "corroborating" matters, it should be noted that Terry Green and very likely other individuals would have been with Frederick Lynn before and after the homicide. People who run in the same circles are very likely to run into each other several times in a night, especially in places like the public housing project and juke joints like the Casino Club. Frederick Lynn and Garrett Marcus Strong were not seen together at unusual times and places, or in proximity of the homicide, considering the layout and traffic pattern of Eufaula. Gooney's house where Terry Green said he was with his girlfriend, Garrett Marcus Strong, and Appellant, Frederick Lynn, was on Randolph Street -- the second longest North-South route in town. (RT-141). To get to Hardees, Kentucky Fried Chicken, and numerous other

nearby businesses as well as most of the rest of Eufaula from the project, one has to cross or go up or down Randolph Street. Terry Green testified that, Frederick Lynn and Garrett Marcus Strong then left Gooney's house in the project, but that he did not know where they went. (RT-272). However, he could not even see in the direction of the home of Marie Driggers Smith.

The next two "corroborating" matters consist of Appellant's alleged possession of a sawed-off shotgun before and after the homicide which is not truly corroboration of his commission of the homicide. First, that possession was not shown to have been exclusive. Any number of people could have had access to the gun described by Terry Green. (RT-266-290 and 26-29E). Second, other than the "sawed-off" description, there was no descriptive or ballistic information to identify it with the fatal weapon. Finally, the only evidence that the fatal weapon was a sawed-off shotgun was Garrett Marcus Strong's testimony.

The fifth "corroborating" matter is Frederick Lynn's alleged request that Herbert Bouyer help him dispose of a sawed-off shotgun, the day after the death of Marie Driggers Smith. This likewise is not "corroboration" of Frederick Lynn's supposed participation in the homicide. Again, there is no description other than "sawed-off" and nothing to relate it to the death of Marie Driggers Smith. Herbert Bouyer's testimony could be used to show an awareness of guilt in general but could not show guilt of a specific crime. In addition, the setting was too remote in time and place to otherwise connect Frederick Lynn with the death of Marie Driggers Smith.

The sixth and final matter of "corroboration" was the sawed-off barrel, but its discovery four weeks later far from the death scene provides no corroboration. Gauge is the only thing to identify it with the fatal weapon.

If one is looking for corroboration of Frederick Lynn's possession of illegal sawed-off shotguns, then there would be sufficient corroboration; but, if one is looking for corroboration of Garrett Marcus Strong's testimony that Frederick Lynn shot Marie Driggers Smith, then there is absolutely no corroboration. There is nothing other than Garrett Marcus Strong's testimony that links Frederick Lynn to the alleged murder of Marie Driggers Smith.

Although the corroboration matters submitted are fairly consistent with Garrett Marcus Strong's testimony, they are also equally consistent with Frederick Lynn's innocence.

In the present case, as in *Mills v. State*, 408 So.2d 187 (Ala. Cr. App. 1981), "there is no item of evidence, standing alone and apart from the accomplice's testimony explaining that evidence which tends to connect the appellant with the crime." The six corroborative matters in this case are virtually meaningless without Strong's testimony explaining how it all fits together. That falls far short of complying with the requirements of the law.

"The tendency of the corroborative evidence to connect accused with the crime, or with the commission thereof, must be independent, and without the aid, of any testimony of the accomplice; the corroborative evidence may not depend for its weight and probative value on the testimony of the accomplice, and it is insufficient if it tends to connect accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice." 23 C.J.S. Criminal Law, Section 812 (b) (1961).

The Trial Court failed to follow the rule announced by the Court in Sorrell v. State, 249 Ala. 292, 31 So. 2d 82 (1947):

"The corroboration necessary to support the testimony of an accomplice must be of some fact tending to prove the guilt of the accused. It is not sufficient if it is equivocal or uncertain in character and must be such that legitimately tends to connect the defendant with the crime. It must be of substantive character, must be inconsistent with the innocence of the accused and must do more than raise a suspicion of guilt...."

This rule has been reiterated again and again by both this Court and the Supreme Court. Caldwell v. State, 418 So.2d 168 (Ala. Cr. App. 1981), Cert. Quashed Aug. 27, 1982; Lindhorst v. State, 346 So.2d 11 (Ala. Cr. App. 1977), cert. denied, 346 So.2d 18 (Ala. 1977); Kimmons v. State, 343 So.2d 542 (Ala. Cr. App., 1977); Anderson v. State, 44 (Ala. App. 388, 210 So.2d 436, 1968); Harris v. State, 420 So.2d 812 (Ala. Cr. App., 1982); and McCoy v. State, 397 So.2d 577 (Ala. Cr. App., 1981), cert. denied, 397 So.2d 589.

"Evidence which logically and rationally is as consistent with innocence as with guilt does not corroborate the testimony of an accomplice." McCoy v. State, 397 So.2d 577, (Ala. Cr. App., 1981); cert denied, 397 So.2d 589 (Ala., 1981); also Ladd v. State, 39 Ala. App. 172, 98 So.2d 56, cert striken, 266 (Ala. 586, 98 So.2d 59, 1957); and Sorrell v. State, 249 (Ala. 292, 31 So.2d 82, 1947).

The evidence in Frederick Lynn's case compels the same conclusion that the Supreme Court reached in Sorrell v. State, supra:

"True, there are circumstances in the case which might be calculated to arouse the curious mind to wonder why they occurred, if defendant were wholly innocent of wrongdoing, but when considered in the light of the governing principles of law above deduced, it is clear the evidence was wanting in the legal requisites necessary to sustain the conviction. The conviction rested on surmise, speculation and conjecture, and the ends of justice require us to enter a reversal..."

If the rule that corroborative evidence must do more than raise a suspicion of guilt applies to any case, it applies to Frederick Lynn's case. "Suspicion cannot be heaped upon suspicion to create a reasonable inference of guilt." McCoy v. State, supra.

Clearly then, suspicious conduct on the part of the defendant is not, in itself, sufficient corroboration of an accomplice's testimony. Peacock v. State, 369 So.2d 61 (Ala. Cr. App., 1979); also Lindhorst v. State, supra. To the contrary, in order to determine whether the requisite corroboration exists, a court must go through a process of elimination or subtraction --- taking away the evidence of the accomplice and determining whether the remaining testimony is sufficient to connect the defendant with the commission of the crime.

Caldwell v. State, supra; McCoy v. State, 397 So.2d 577 (Ala. Cr. App., 1979); Kimmons v. State, supra; Keller v. State, 380 So.2d 926 (Ala. Cr. App.), writ denied, 380 So.2d 938 (Ala., 1980); and Leonard v. State, 459 So.2d 970 (Ala. Cr. App., 1984), cert. quashed Nov. 21, 1984.

According to the Caldwell Case:

"Being in the company of an accomplice in proximity in time to the commission of the crime is not always sufficient corroboration to comply with statutory demands. Rather, when an accomplice and an accused are seen together in somewhat unusual places and times in proximity to the locus of the crime, which occurs at an unreasonable hour, the requirements of corroboration are met."

In the present case, we are not dealing with "unusual places", "unusual times", "proximity to the locus of the crime", or "unreasonable hour". To the contrary, in the present case, the corroborators can place defendant only in very usual places at very usual times for defendant and his peer group.

In the case, Booker v. State, 477 So.2d 1388 (Ala. Cr. App., 1985), the Court of Criminal quoted with approval the following from 23 C.J.S. Criminal Law, Section 812 (b) (1961):

"The tendency of the corroborative evidence to connect accused with the crime, or with the commission thereof, must be independent, and without the aid, of any testimony of the accomplice; the corroborative evidence may not depend for its weight and probative value on the testimony of the accomplice, and it is insufficient if it tends to connect accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice."

In the present case, the corroborative evidence does depend entirely upon the testimony of the accomplice for its weight and probative value. Without Strong's testimony, the evidence is scattered, erratic, and at best creates suspicion.

In the case, Thompson v. State, 374 So.2d 388 (Ala., 1979), the Alabama Supreme Court stated that there are two types of corroborative evidence. The first type consists of facts which support the testimony of the accomplice without regard to defendant's alleged participation in the criminal activity. The second type is evidence which tends to connect the defendant with the commission of the offense. The Supreme Court ruled that it is the second type of corroboration that is essential to support an accomplice's testimony. In the present case, it is that second type of corroboration that is totally absent.

Furthermore, it has been repeatedly held that corroborative evidence must do more than raise a suspicion of guilt. Thompson v. State, 374 So.2d 388 (Ala., 1979); McCoy v. State, 397 So.2d 577 (Ala. Cr. App.) cert. den. 397 So.2d 589 (Ala., 1981); Anderson v. State, 44 (Ala. App. 388, 21 So.2d 436, 1968); and Deerman v. State, 456 So.2d 515 (Ala. Cr. App., 1986). In the present case, it is doubtful that the corroborating evidence by itself would even raise a serious suspicion.

In the present case, if all of the hearsay and other indirect evidence were to be replaced by the most direct evidence of the same matters, there would still be no proper corroboration of Garrett Marcus Strong's testimony. The Trial Court should have rendered a Judgment acquitting defendant.

ARGUMENT  
IX

THE TRIAL COURT  
SHOULD HAVE DECLARED A MISTRIAL AFTER  
DISTRICT ATTORNEY STATED IN ARGUMENT  
THAT HE BELIEVED WHAT WITNESS  
SAID DURING INVESTIGATIVE  
INTERVIEW.

In final closing argument, the District Attorney interjected his own testimony into evidence. (RT-353). He indicated that he was present during an interview of co-defendant and witness, Garrett Marcus Strong -- a matter not in evidence, although the witnesses' written statement was: (23-26E). "When that kid laid it on the line on September 23, 1982, without any promising or any help from anybody and told me who pulled that trigger, I believed it."

Immediately, the jury's attention was diverted from the real question: Garrett Marcus Strong's credibility. Instead, their attention was shifted to the credibility of the District Attorney. He might as well have told the jury: "You know me, you trust me, my witness is telling the truth."

The Trial Court recognized the impropriety of the argument and even attempted to give curative instructions. (RT-354-355). The prejudicial nature of the remark was so severe, however, that no curative instruction would be adequate.

In Tarver v. State, 492 So.2d 328 (Ala. Cr. App., 1986), the District Attorney (who prosecuted the case) took the witness stand and gave sworn testimony concerning the voluntariness of defendant's confession. The Alabama Court of Criminal Appeals ruled that such conduct was so clearly erroneous and so severely prejudicial that the conviction would have to be reversed, even though defendant did not object. In that case the prosecutor at least was under oath and subject to cross-examination, unlike the present case. In addition, in the present case, an objection and a motion for mistrial were made.

## ARGUMENT

X

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A RANDOM DRAW DOWN OF THE QUALIFIED JURY PANEL IMMEDIATELY PRIOR TO THE MAKING OF PEREMPTORY STRIKES.

The type of argument/testimony that we have in the present case has been repeatedly condemned. Waldrop v. State, 424 So.2d 1345 (Ala. Cr. App., 1982); McGhee v. State, 274 (Ala. 373, 149 So. 2d 5, 1963); Brown v. State, 393 So.2d 513 (Ala. Cr. App., 1981); Hall v. U.S., 419 F. 2d 582 (5 Cir., 1969); Adams v. State, 280 (Ala. 678, 198 So.2d 25S, 1967); Knighten v. State; 3 S (Ala. App. 524, 49 So.2d 789, 1951); and Weatherspoon v. State, 34 (Ala. App. 450, 40 So.2d 910, 1949).

The District Attorney's statement of personal belief and testimony concerning witness' interview greatly exceeded the bounds of legitimate argument and denied defendant a fair trial; the error was so prejudicial that it could not be cured by subsequent instructions of the trial court. Jetton v. State, 435 So.2d 167 (Ala. cr. App., 1983); Blue v. State, 246 (Ala. 73, 19 So.2d 11; and Dubose v. State, 148 (Ala. '560, 42 So. 867).

Regardless of the black-white ratio on qualified jury panel immediately prior to peremptory strikes, the number of whites needs to exceed the number of blacks only by twelve for the prosecution to be able to exclude every black from jury service. Thus, the larger the panel from which peremptory strikes are made, the better the opportunity is for the prosecution to peremptorily remove all blacks from jury duty. With the racial ratios on the Barbour County jury panel, a random reduction of that panel to 36, the statutory minimum, (Code of Alabama, 1975, Section 12-16-100), would have made it impossible for the State to strike every black. (RT-54). Defendant filed a timely motion for such a reduction, and the motion was denied. (10-C, RT-10). The Trial Court's denial of Appellant's Motion for a random draw down of the panel to a level that would allow at least some blacks to serve on the jury was in violation of the due process and equal protection clauses of Amendment XIV to the United States Constitution and Sections I and VI of the Alabama Constitution.

In view of the positions of some courts which permit any type of rationalization by the District Attorney as compliance with Batson, it is especially important to minimize the ability of attorneys to affect the racial composition of juries.

ARGUMENT

XI

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BARREL FROM A SAWED-OFF SHOTGUN FOUND AT THE HOME OF APPELLANT'S GRANDMOTHER.

Over the Appellant's objection, the Trial Court allowed into evidence gun parts and testimony concerning gun parts discovered at the home of Appellant's grandmother four weeks after the alleged homicide. (RT-190, 191, 212, 213). Although parts were from a gun of the same gauge as the fatal weapon, they were not shown to have come from the fatal weapon. They were not shown to have ever been in Appellant's possession but were merely found at a house in which Appellant and other people resided. The barrel was never shown to have been connected with the slug removed from the victim. The record does not indicate that the shotgun from which the fatal bullet was fired or any part of it was ever found. The record does not indicate that the gun from which the barrel was sawed was ever found. At the same location where the 20-gauge barrel was found, another barrel of a different gauge was found. (RT-193).

The State's expert witness, Lonnie Ray Harden, was unable to say anything about the barrel other than that it came off of a 20-gauge shotgun. (RT-215-216). He also testified that the slug removed from the body of Marie Driggers Smith was a 20-gauge shotgun slug. (RT-217). Twenty-gauge shotguns and 20-gauge shotgun shells are just much too common to link the barrel to the homicide.

This is a situation similar to that found in the case, Anderson v. State, Ala. Cr. App., 1978, 362 So. 2d 1296. In the Anderson Case, the Trial Court admitted into evidence a .375 magnum pistol which was discovered four months after a murder and four blocks from the murder scene. In that case, the only evidence touching its relevancy or materiality was that such a weapon could have been responsible for some of the injuries to the deceased and testimony that one of the assailants often carried a similar weapon. In the present case, the fact that the barrel was a 20-gauge barrel and that the deceased was shot with a 20-gauge slug shows merely that the barrel could have come off of the weapon causing Mrs. Smith's death. Other testimony showed that the Appellant on occasion carried a sawed-off shotgun. The weapon was found much further than four blocks from the scene of the homicide (several miles, as a matter of fact). The only significant difference between the Anderson Case and the present case is that the Appellate Court in the Anderson Case considered the admission of the weapon to be harmless. In the present case, considering the overall lack of evidence presented by the State, admission of the gun barrel was quite prejudicial and could not in any sense be considered as harmless.

The holding by the Alabama Court of Criminal Appeals in the Anderson Case is clearly consistent with its holding in the case Washington v. State, 56 Ala. App 555, 323 So. 2d 738 (1975). In Washington Case, the Court held that a weapon

should not be admitted into evidence unless there is evidence tending to show that it was used by defendant at time of the alleged homicide. A mere possibility is clearly inadequate.

Although there might be some tendency to consider the objection to the gun barrel as being a chain of custody matter, the real question is one of relevancy or materiality. The issue is not what might have happened to the barrel after it was discovered at Mrs. Rencie Lynn's carport; but, instead, the issue is whether it has been established that the barrel is in any way connected with the gun which caused Mrs. Smith's death. Clearly it could have been, but so could any other barrel from any other 20-gauge shotgun.

In many cases dealing with admissibility of weapons considered by the Appellate Courts, the decisions were that the weapons were admissible; but, in those cases allowing the evidence, the weapon was specifically connected with the crime. In Cunningham v. State, 22 Ala. App. 583, 118 So. 242, the Court held that a hammer found in defendant's workshop was admissible because it had been specifically identified as the hammer used in an assault. In Russell v. State, 54 Ala. App. 452, 309 So. 2d 489 (1974), the Appellate Court held that the Trial Court properly admitted a butcher knife into evidence based on evidence that the deceased was stabbed with a butcher knife and that a butcher knife was found on defendant's person immediately after the attack. In McGuffin v. State, 178 Ala. 40, 59 So. 635 (1912),

the Alabama Supreme Court ruled that the Trial court properly allowed a pistol in evidence where a witness specifically identified it as being either the actual weapon or identical to a weapon used in a homicide. In Williams v. State, 384 So. 2d 1205 (Ala. Cr. App. 1980), a shotgun was admitted into evidence only because ballistics testing positively indicated that it fired the shell found at the scene of the murder.

In ruling that the Trial Court properly admitted into evidence a shotgun barrel found at the home of the Appellant's grandmother, the Court of Criminal Appeals overlooked several important consideration.

First, assuming that the barrel was in fact from the gun that fired the fatal slug, it is clear that it was removed prior to the homicide. (R 151, 160, 242). Therefore, the barrel was not a part of the gun causing Mrs. Smith's death. The barrel itself had nothing to do with the homicide. None of the cases cited by this Court stood for the proposition that a gun part is admissible into evidence if it was removed from the suspected weapon prior to the crime. Taylor v. State, 442 So. 2d 128 (Ala. Crim. App.) cert. denied, 442 So. 2d 128 (Ala. 1983); Humphrey v. State, 370 So. 2d 344 (Ala. Crim. App. 1979); Means v. State, 51 Ala. App. 8, 282 So. 2d 356, cert. denied, 291 Ala. 792, 282 So. 2d 359 (1973); Williams v. State, 384 So. 2d 1205 (Ala. Cr. App. 1980). There was no evidence whatsoever that a sawed-off barrel was in any way connected with Mrs. Smith's death.

Second, if one ignores the fact that the barrel was not used to cause Mrs. Smith's death, the connection between the homicide and the alleged homicide weapon cannot be established with the certainty indicated in the cited cases. In the Williams Case, a ballistics expert determined that the fatal rounds had been fired from the weapon in question; in the present case, such a determination was impossible. (R 145). In Means v. State, supra., this Court affirmed the trial court's admission of a bloody knife found at a murder scene; the present case deals with a barrel found a considerable distance from the homicide scene and having no markings or stains that would have ever placed it at the scene. In Humphrey v. State, supra., the shotgun admitted into evidence was identified by various witnesses as being in the defendant's possession at the time of the crime; in the present case, no witness was able to connect Lynn with the barrel at or near the time of the homicide. In Taylor v. State, supra., the forensic expert was able to identify the make and model of the murder weapon but he was not able to say that a particular weapon of that make and model was the one from which the shot was fired. The opinion does not indicate where and how the gun was recovered. In the present case, the expert could only say that the slug was twenty-gauge; he could not give the make or the model. In addition, the barrel was discovered much later and at a considerable distance from the homicide scene. The connecting factors found in the Taylor Case are just no present.

In Frederick Lynn's case, the failure of the Trial Court to sustain Appellant's objection to the admissibility of the barrel and the failure of the Trial Court to grant defendant's motion to exclude that testimony were error and were clearly prejudicial to the defendant in that there was absolutely no other physical evidence tending in any way to link Appellant, Frederick Lynn, to the killing of Marie Driggers Smith. This error on the part of the Trial Court alone is sufficient grounds for reversing the conviction of Frederick Lynn.

ARGUMENT

XII

THE ALABAMA DEATH PENALTY STATUTE  
IS UNCONSTITUTIONAL IN THAT IT CONSTITUTES  
CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION  
OF THE CONSTITUTIONS OF THE UNITED STATES AND OF ALABAMA

The question of the constitutionality of the Alabama Death Penalty Statute has not been developed herein. Appellant is aware that this Court has been presented with every conceivable argument that the Alabama Death Penalty Statute is unconstitutional in that it constitutes cruel and unusual punishment, forbidden by both the United States and Alabama Constitutions. For the purpose of preserving the issue for any further appeals which might be taken in State or Federal Court, the Appellant does hereby contend that the Alabama Death Penalty Statute is unconstitutional per se and that it is unconstitutional as it is specifically applied to the present case. However, Appellant cannot provide any further enlightenment on these issues and begs the Court to consider these propositions as they have been presented in other death-penalty cases.

ARGUMENT

XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION  
THAT THE APPELLANT RECEIVE TWO STRIKES FOR EACH ONE  
STRIKE FOR THE STATE IN JURY SELECTION.

The alleged homicide in the present case took place in 1981; and, at that time, the law allowed the defense two strikes for each one strike of the prosecution. (Code of Alabama, 1975, Section 12-16-122). In 1982, the Statute was amended to allow the defendant only one strike for each strike by the prosecution. (Code of Alabama, 1975, Section 12-16-100, Act No. 82-221).

The Legislature in passing a law in 1982 affecting crimes committed in 1981 enacted a "ex post facto" law in violation of Section IX of the United States Constitution and Section VII and XXII of the Alabama Constitution. Furthermore, under the due process clauses of Amendment XIV to the United States Constitution and Section VI of the Alabama Constitution, a person may not be convicted of a crime unless the evidence establishes his guilt beyond a reasonable doubt. Because it is human nature to assume that one who has been officially accused of a crime is guilty as charged, the two-for-one strike is essential to an effective presumption of innocence and to an effective standard that a defendant must be proven guilty beyond a reasonable doubt in order to be convicted.

Furthermore, the legislative act which abolished the two-for-one strike provision was not cleared by the U.S. Department of Justice as required by the Voting Rights Act of 1965, U.S.

Code, Title 42. Any statute potentially affecting the political power of Negroes must be pre-screened by the U.S. Justice Department. It goes without saying that a member of a minority race attempting to get members of his own race on a jury would better able to do so with the old two-for-one strike system.

ARGUMENT  
XIV

WHEN COMPARED WITH SIMILAR CASES, THE DEATH PENALTY IS INAPPROPRIATE IN THIS CASE.

Research discloses no death penalty case in the past decade which is in any way comparable to the present case.

In Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), affirmed in part and reversed in part, 361 So. 2d 666 (Ala. 1978), cert. denied, 99 S. Ct. 1267, 440 U.S. 9301, small children were present when the murder was committed; Evans was under sentence of imprisonment at the time of the murder; and Evans had been involved in over 250 robberies and kidnappings. In Ritter v. State, 375 So. 2d 266, (Ala. Crim. App. 1978), affirmed, Ex parte Ritter, 375 So. 2d 270 (Ala. 1979), again small children were present during the murder; and again there was a long record of crimes of violence. In Bush v. State, 431 So. 2d 555, (Ala. Crim. App. 1982), affirmed, 431, So. 2d 563, (Ala. 1983), the defendant was on a crime spree during which he robbed at least two convenience stores and shot three people, two of whom died from their wounds. In addition, the defendant had a prior record of a crime of violence. Also, the crime was committed for the purpose of eliminating an eye witness to a murder.

In the prior appeal of this case (4 Div. 183, Lynn v. State, 477 So. 2d 1365, (Ala. Cr. App. 1986), the Court of Criminal Appeals compared the present case with Clisby v.

State, 456 So. 2d 86 (Ala. Cr. App. 1982), aff'd in part, rev'd in part, 456 So. 2d 95 (Ala.), on remand, 456 So. 2d 98 (Ala. Cr. App.), on remand 456 So. 2d 99 (Ala. Cr. App.), aff'd, 456 So. 2d 102 (Ala. Cr. App. 1983) aff'd 456 So. 2d 105 (Ala. 1984). That comparison, it is submitted, is likewise inappropriate. Clisby beat a fifty-eight year old crippled man to death with an axe. The victim in the present case had a quick death from a single gunshot wound. Clisby had a prior conviction for murder. Lynn has no significant prior history of criminal activity. Clisby was an adult at the time of his crime, while Lynn was a juvenile.

The Court of Criminal Appeals also compared the present case with the case Lindsey v. State, 456 So. 2d 383 (Ala. Cr. App. 1983), aff'd, 456 So. 2d 393 (Ala. 1984). Lindsey has a significant history of prior criminal activity, while Lynn has no such history. Lindsey was an adult at the time of the crime, while Lynn was a child. Lindsey both shot and stabbed his victim, each sufficient to cause death, while the victim in the present case died of a single gunshot wound.

Below is a brief synopsis of other recent cases showing imposition of death sentences for crimes far more heinous than the crime with which Lynn was charged.

Ex parte Floyd, 486 So. 2d 1321 (Ala. 1986): Victim was dragged from car, robbed, beat, kicked, stomped, tied to a tree, and run over by a car. The defendant had two prior convictions for robbery. He was an adult at the time of the homicide.

Ex parte Bell, 475 So. 2d 609 (Ala. 1985): Victim was tied up and stuffed into the trunk of a car. Victim was hauled into the woods, then was pushed into a trench, and was shot twice in the head.

Ex parte Jefferson, 473 So. 2d 1110 (Ala. 1985): Victim sustained deep multiple lacerations. Death was slow. Circumstances showed defendant to be an unusually depraved man.

Ex parte Kennedy, 472 So. 2d 1106 (Ala. 1985): Victim was killed slowly by suffocation with a pillow. Victim was raped repeatedly, beaten and cut. This was one of the most heinous crimes in our state's history.

Ex parte Harrell, 470 So. 2d 1309 (Ala. 1985): The victim was a police officer in the line of duty. The defendant had a bad criminal record. The defendant was unrepentant and was seen clapping and smiling immediately after the homicide.

Ex parte Thomas, 460 So. 2d 216 (Ala. 1984): The victim had been shot 6 times while she was nude. There were numerous injuries to her body while she was still alive. She had been tortured, raped, sexually abused, and mutilated. The defendant had a long record of criminal history. This also was one of the most vile crimes in the state's history.

Ex parte Grayson, 479 So. 2d 76 (Ala. 1984): Defendant burglarized, beat, terrorized, raped, and suffocated to death a helpless 80-year old lady.

Ex parte Watkins, 509 So. 2d 1065 (Ala. 1984): Defendant had prior record of crime of violence. In the capital felony, he terrorized a store full of people before killing a store employee.

Ex parte Duren, 507 So. 2d 121 (Ala. 1987): There were two victims, one who survived and one who did not. Both victims were tied up and hauled around in the trunk of a car before being shot repeatedly.

Ex parte Thompson, 503 So. 2d 887 (Ala. 1987): Defendant robbed and kidnapped victim, hauled her around in her automobile, put her in a well, and shot her repeatedly.

Ex parte Tarver, 500 So. 2d 1256 (Ala. 1986): Defendant was on parole and had been previously convicted of crimes. The victim was shot three times.

Ex parte Hubbard, 500 So. 2d 1231 (Ala. 1986): The defendant had a prior murder conviction. The defendant shot victim three times with a significant amount of time between each shot; and the victim obviously suffered much pain and agony.

Ex parte Jones, 456 So. 2d 380 (Ala. 1984): The victim was shot three times. He had also been struck by a blunt object. Defendant was on parole at time of homicide and had a bad prior record for crimes of violence.

Clearly, none of these cases are similar to the present case. 1. Lynn is accused on only one homicide. 2. No children were present. 3. Lynn had no record of crimes of violence. 4. Lynn was not under sentence of imprisonment.

5. There is no evidence that Lynn was attempting to eliminate an eyewitness to a crime. 6. The victim was not tortured, raped, or mutilated.

Considering the above factors together with the fact that Lynn was only 16 at the time of the alleged homicide, certainly this is not a case in which the death penalty is the appropriate punishment.

In addition to comparing Lynn's case with "similar cases", look at the different sentences for two possible accomplices in the same case. Because of a plea-bargaining deal, the only man who is known to have been at the scene of the crime received a thirty-year sentence--and, based solely upon his word, another person might suffer the death penalty. (Garrett Marcus Strong was caught by his fingerprints and also confessed). Is it right to allow a confessed killer to live and, based solely on his word, put another person to death?

CERTIFICATE OF SERVICE

I hereby certify that I have this 10<sup>th</sup> day of September, 1987, served copies of the foregoing Brief by placing copies of said Brief in the United States Mail, postage prepaid, and addressed to the following:

Honorable Don Siegelman  
Attorney General  
Alabama State House  
Montgomery, Alabama 36130

Donald J. McKinnon  
Donald J. McKinnon  
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

FREDERICK LYNN v. ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT  
OF CRIMINAL APPEALS OF ALABAMA

No. 89-5508. Decided October 30, 1989

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,  
dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to determine whether a prosecutor's reliance on a nonracial criterion in exercising his peremptory jury challenges violates the Equal Protection Clause where that criterion is highly correlated to race and the bias that the prosecutor seeks to exclude through the use of that criterion could easily have been discovered on *voir dire*.

Petitioner Frederick Lynn, an Afro-American, was convicted of murder by an all-white jury and sentenced to death. During *voir dire*, the prosecutor exercised 11 of his 14 peremptory challenges to remove all of the potential Afro-American jurors. The crime occurred in Barbour County, Alabama, a small community with approximately equal white and Afro-American populations. General Population Characteristics, Alabama, Census of Population 2-15 (1980) (13,693 whites, 11,003 Afro-Americans). Certain neighborhoods within the community are populated predominately by people of color.

While Lynn's appeal was pending, this Court lowered the threshold showing required for a criminal defendant to estab-

lish a prima facie case of purposeful discrimination in jury selection. *Batson v. Kentucky*, 476 U. S. 79, 97 (1986). To make out such a case, a defendant must establish first that he is a member of a cognizable racial group and that the prosecutor has acted to remove members of that group from the venire; second, that the procedure used by the State permits those "who are of a mind to discriminate" to do so; and third, that the facts and circumstances of the case raise the inference that the State acted in a discriminatory manner. *Id.*, at 96. To rebut a prima facie case of racial discrimination, the prosecutor must offer a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 258 (1981)). We subsequently determined that the ruling in *Batson* applies retroactively to state convictions pending on direct review at the time of the *Batson* decision. *Griffith v. Kentucky*, 479 U. S. 314 (1987).

The Alabama Court of Criminal Appeals remanded Lynn's case to the trial court to conduct an evidentiary hearing on his *Batson* claim. At that hearing, the prosecutor gave a juror-by-juror explanation of his peremptory strikes. The prosecutor stated that he exercised his fourth strike to exclude an Afro-American juror that "live[d] on the Gammage Road in an area where the defendant, Frederick Lynn, was living at the time of this crime, and also where . . . the defendant's grandmother and aunt . . . have lived for numerous years. I felt that friendship would possibly be there that would bias [the juror], and for that reason struck him." App. 5 to Pet. for Cert. 7. The prosecutor indicated that he struck another juror on similar grounds:

"She also lives on Gammage Road and was a neighbor to [defendant's grandmother] and also [defendant's aunt], and also was living in close proximity to the defendant who was living with his grandmother and aunt at the time of the crime. We felt the possibility of knowing

these people might affect her fairness, and for that reason we struck her." *Id.*, at 11. (Emphasis added).

On cross-examination, the prosecutor stated that the area along Gammage Road is populated primarily by people of color. *Id.*, at 20.

The trial court determined that these explanations rebutted petitioner's *prima facie* case of discrimination in jury selection. The Alabama Court of Criminal Appeals, applying a "clear error" standard to the trial court's determination, affirmed in a split decision. *Ex parte Lynn*, 543 So. 2d 709 (Ala. 1988).

In a small community with racially identifiable neighborhoods, an individual's address closely corresponds to his or her race. In this case, the prosecutor justified two of his strikes on the possibility that the challenged venirepersons "might" have known persons connected with or interested in the trial merely because they lived in the same neighborhood. Yet the prosecutor did not ask these potential jurors whether they *actually* knew anyone involved in the trial, although he had ample opportunity to do so on *voir dire*. Such an inquiry is a standard part of *voir dire* practice. In fact, if the prosecutor's true concern was the challenged jurors' familiarity with persons interested in the trial's outcome, he could have established the validity of that concern and struck such jurors for *cause*, preserving the State's peremptory strikes. His failure to do so suggests that the proxy for bias on which he actually relied was not place of residence but race.

Mere place of residence, or any other factor closely related to race, should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on *voir dire* that the challenged venirepersons actually entertain the bias underlying the use of that factor. This is true particularly when, as in this case, the prosecutor can easily ascertain the existence of the alleged bias without use of the overly broad proxy for bias. To hold otherwise would ren-

der *Batson's* protections against race discrimination in jury selection illusory.

Accordingly, I would find that the prosecutor's uncorroborated suspicions of bias on the part of two challenged venirepersons insufficient to rebut the *prima facie* case of discrimination in this case. A *Batson* violation occurs when a prosecutor strikes *any* juror on the basis of race. *Batson*, 476 U. S., at 99, n. 22 ("The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race"). I dissent.